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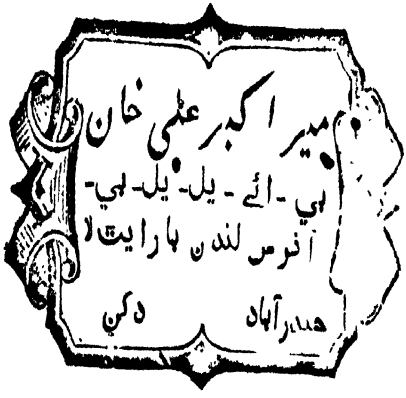
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THE
LAW OF PROCEDURE

THE
LAW OF PROCEDURE

A HANDBOOK FOR STUDENTS AND PRACTITIONERS

BY

W. NEMBHARD HIBBERT

LL.D. (LOND.)

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW; SOMETIME DEAN OF THE FACULTY OF LAWS, UNIVERSITY OF LONDON, AND LECTURER ON PROCEDURE AT KING'S COLLEGE, UNIVERSITY OF LONDON; LECTURER ON EVIDENCE, JURISPRUDENCE, AND PRIVATE INTERNATIONAL LAW AT KING'S COLLEGE, UNIVERSITY OF LONDON; AUTHOR OF "THE LAW OF EVIDENCE" AND "INTERNATIONAL PRIVATE LAW," AND JOINT AUTHOR OF "THE LAW RELATING TO COMPANY PROMOTERS," AND OF "COCKLE AND HIBBERT'S LEADING CASES IN COMMON LAW."

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PREFACE TO SECOND EDITION

THE object of this edition is to bring the work up to date and make some few additions which constant use of the First Edition has shown to be desirable.

W. NEMBHARD HIBBERT.

1 GARDEN COURT,
TEMPLE, E.C.4
1921

PREFACE TO FIRST EDITION

THE object of this work is to present in as concise and simple a form as possible a complete treatment of the subject, including the details of the various Courts and their jurisdiction.

The work is primarily intended for law students at the Universities, the Inns of Court, and the Law Society; but it is hoped that it may also prove useful to the practitioner.

W. NEMBHARD HIBBERT.

1 GARDEN COURT,
TEMPLE, E.C.4
1915.

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THE
LAW OF PROCEDURE

PART I

THE COURTS: THEIR JURISDICTION AND OFFICIALS

IT is proposed to commence with the lowest Court.

(I) **PETTY SESSIONS.**—This Court is constituted by one or more Justices of the Peace or by a Stipendiary Magistrate, and has civil jurisdiction as follows—

Disputes between masters and servants, other than domestic servants, up to £10 (38 & 39 Vic. c. 86).

Recovery of seamen's wages up to £50. [*N.B.*—The High Court cannot deal with cases below this amount unless the shipowner is bankrupt or the ship is under arrest by the High Court (57 & 58 Vic. c. 60, Secs. 164–65).]

Disputes between members of a Friendly Society (59 & 60 Vic. c. 25, Sec. 42 (2)).

Injury to cattle by dogs up to £5 (6 Edw. VII. c. 32).

Recovery of possession by a landlord where the tenancy has expired or has been determined by notice to quit, provided the rent is not more than £20 a year (1 & 2 Vic. c. 74).

Affiliation proceedings.

Judicial separation if a husband has been convicted of aggravated assault on the wife, or has deserted her, or has been guilty of wilful neglect or persistent cruelty (58 & 59 Vic. c. 39) ; or if either party is convicted of being an habitual drunkard (2 Edw. VII. c. 28).

Appeal lies on fact to Quarter Sessions and on law to the King's Bench Divisional Court.

(II) **QUARTER SESSIONS.**—This Court is composed of two or more Justices of the Peace, or, in a borough, a Recorder.

Its civil jurisdiction consists chiefly of hearing appeals from Petty Sessions.

(III) **THE COUNTY COURT.**—This Court was founded in 1846 for the recovery of small debts (i.e. up to £20), but now it has a considerable jurisdiction. The jurisdiction is conferred by Acts of 1888, 1903, 1919, and some others. The 1903 Act raised the jurisdiction from £50 to £100. The sections hereinafter mentioned refer to the 1888 Act, in the absence of anything to the contrary.

The Court is presided over by a County Court Judge, and there may be a jury of eight, though leave must be obtained if the amount in dispute is not over £5 (Sec. 101).

It has a **Transferred** and an **Original Jurisdiction.**

Transferred Jurisdiction. Actions and counterclaims—if the claim having been disposed of, only the counterclaim remains—may be transferred from the High Court to the County Court in contract and tort up to £100; also actions for recovery of land by a landlord if the action could have been commenced in the County Courts (1919 Act, Sec. 1); also actions in tort up to any amount where plaintiff, if unsuccessful, will be unable to pay costs, unless he gives security for them or the Court thinks fit to retain the action in the High Court (1919 Act, Sec. 2); also applications to attach debts or for leave to levy execution up to £100 (1919 Act, Sec. 3); also interpleader up to £500 (Judicature Act, 1884, Sec. 17).

Original Jurisdiction. In contract and tort, if the claim is not over £100 (Sec. 56); but if the claim is over £20 in contract or over £10 in tort, and important questions of law or fact are involved, the defendant may get the action stayed and the plaintiff will then have to sue in the High Court (Sec. 6).

Ejectment and title to corporeal or incorporeal hereditament, other than toll, fair, market, or franchise, if neither the rent nor the annual value exceeds £100 a year (Secs. 56 & 60).

In ejectment, the action must be by a landlord against

a tenant whose term has expired, or has been determined by notice to quit, or forfeited for non-payment of rent, the rent being a half year in arrear (Secs. 138, 139). In case, however, the title to other land worth more than £100 a year may be affected, an order may be obtained from the High Court to transfer the action to the High Court (Sec. 59).

In all the above cases, the Court has jurisdiction up to any amount if the parties agree in writing that the Court may deal with the matter (Sec. 61).

A counterclaim may be made up to any amount if the parties consent. But judgment can only be obtained up to £100 ; though if the Court finds for the defendant on it, he may bring a fresh action for the balance when the liability cannot be disputed, though the amount may (Judicature Act, 1884, Sec. 17).

The Court has no jurisdiction in libel, slander, seduction, or breach of promise of marriage, nor if any title to a corporeal or incorporeal hereditament, or the right to any toll, fair, market, or franchise will come **incidentally** in question, unless in any of such cases the parties consent in writing ; but even then judgment shall not be evidence of title to such hereditament, toll, etc., in other actions (Sec. 56).

In interpleader, the Court has jurisdiction only if the case arises out of an execution levied by a County Court bailiff (County Courts Act, 1867, Sec. 31), or out of an action pending in the County Court (Judicature Act, 1873, Sec. 89).

Chancery Matters. The Court has jurisdiction in administration, trusts, mortgages, liens and charges, specific performance, maintenance and advancement of infants, dissolution of partnership, and relief against fraud, where neither the value of the estate nor the damage claimed exceeds £500 (Sec. 67). Also in determining whether property is separate estate of a married woman, as an alternative Court to a Judge in Chambers of the High Court (Married Women's Property Act, 1882, Sec. 17).

Admiralty. Certain County Courts have jurisdiction as follows—

Collision and salvage up to £300, provided in the latter case the ship is not worth more than £1,000.

Wages, towage, necessaries, up to £150.

Actions *in rem* arising out of agreements for the hire of a ship, up to £300. In this case, the Admiralty Division of the High Court has no jurisdiction if any owner or part owner is domiciled in England or Wales, but may transfer the case to itself for trial (*The Swan*, 3 A. & E., 315; *The Montrose*, 116 L.T.R., 383; and Administration of Justice Act, 1920, Sec. 5).

In above cases, up to any amount by written agreement (31 & 32 Vic. c. 71; 32 & 33 Vic. c. 51).

Bankruptcy. Most County Courts outside London have unlimited jurisdiction in bankruptcy if the debtor has resided or carried on business outside the London district for the greater part of the six months preceding the presentation of the petition; but in case of a dispute between the trustee and a stranger, e.g. as to whether certain property belongs to the stranger or to the bankrupt, the jurisdiction is limited to £200 (Bankruptcy Act, 1914, Secs. 98, 105).

Company Winding Up. If the registered office is situate within the County Court district, and the paid-up capital does not exceed £10,000, the County Courts outside the London district have jurisdiction (Companies Consolidation Act, 1908, Sec. 131).

Probate. In non-contentious matters, the Court may grant letters of administration to the widow or the children of a deceased intestate if the property does not exceed £100 (36 & 37 Vic. c. 52; 38 & 39 Vic. c. 27).

In contentious matters, the Court may deal with the grant and revocation of probate and letters of administration, provided the realty does not exceed £300 in value, nor the personalty £200 (Probate Act, 1858).

County Courts have exclusive and unlimited jurisdiction

in matters arising under the following Acts : Agricultural Holdings Act, 1908 ; Alkali Works Regulation Act, 1906 ; Employers' and Workmen's Act, 1875 ; Employers' Liability Act, 1880 ; Workmen's Compensation Act, 1906 ; and also in replevin.

The Court has appellate jurisdiction from the Registration Officer, who decides franchise disputes, whence appeal lies to the Court of Appeal, whose decision is final (Representation of the People Act, 1918).

As a rule, the action is to be brought in the Court of the district in which the defendant resides or carries on business ; but by leave of the Registrar it may be brought in the Court of the district in which the whole or a part of the cause of action arose, or in which the defendant has dwelt or carried on business within the preceding six months (Sec. 74).

In cases relating to land, the situation of the land determines the Court (Sec. 75) ; in replevin, where the goods are seized (Sec. 133) ; in probate and administration, where the deceased was domiciled at death or where the executors reside (Sec. 75) ; trusts, where the applicant resides ; partnership, where the business is carried on ; bankruptcy, where the debtor has resided or carried on business for the greater part of the six months preceding the presentation of the bankruptcy petition (Bankruptcy Act, 1914, Sec. 98).

If an action is commenced in the wrong Court, the Judge may strike it out, or try it, or transfer it to the proper Court (County Court Act, 1919, Sec. 10).

An appeal lies from a determination or direction of the judge on law or equity, or the admission or rejection of evidence, to a Divisional Court of the King's Bench, except in probate cases, when it lies to the Probate Division, and in workmen's compensation cases, and appeals on law under the Agricultural Holdings Act, 1908, and appeals under the Representation of the People Act, 1918, when it lies to the Court of Appeal.

As a rule, leave to appeal must be obtained from the Judge if the amount is not over £20.

(IV) **THE CITY OF LONDON COURT.**—This Court has all the jurisdiction of a County Court in the City of London (County Courts Act, 1888, Sec. 185); but persons who merely have employment in the City are also subject to the jurisdiction (*Kutner* v. *Phillips*, 1891, 2 Q.B. 267; 64 L.T.R. 628).

(V) **THE MAYOR'S COURT, LONDON.**—This Court is composed of the Recorder of London, the Common Serjeant, and an Assistant Judge.

It has unlimited jurisdiction in contract, tort, and ejectment, provided the whole cause of action arose in the City, and jurisdiction up to £50 if part of the cause of action arose in the City, or the defendant, at the commencement of the action, dwelt or carried on business there or has done so within the six months before the commencement of the action (20 & 21 Vic. c. 157, Sec. 12). It has no jurisdiction in replevin, which is dealt with in the City of London Court.

Appeal lies in case of error on the record to the Court of Appeal, in other cases to the King's Bench Divisional Court; but leave of the Mayor's Court is necessary if the claim is under £20.

By the Mayor's and City of London Court Act, 1920, the above two Courts have been amalgamated under the title of the "Mayor's and City of London Court." The staff is the Recorder, the Common Serjeant, the Assistant Judge of the Mayor's Court, and one additional judge, or two if the Lord Chancellor thinks them necessary. High Court procedure shall apply to matters formerly within the sole jurisdiction of the Mayor's Court; and County Court procedure to those formerly within the jurisdiction of the City of London Court.

(VI) **THE UNIVERSITY COURTS.**—

Oxford. The Vice-Chancellor has jurisdiction in all cases where the defendant is a member and resident in

the University. Appeal lies to a King's Bench Divisional Court.

Cambridge. The Vice-Chancellor has jurisdiction only if both parties are members, and the defendant is also resident (19 & 20 Vic. c. 17). Appeal lies to a King's Bench Divisional Court.

(VII) **THE LIVERPOOL COURT OF PASSAGE, SALFORD HUNDRED COURT, BRISTOL TOLZEY COURT, BRISTOL PIE POUDRE COURT.**—Unlimited jurisdiction is given if the cause of action arose in the borough. Appeal lies to the King's Bench Divisional Court (Judicature Acts, 1873, 1894), except from the LIVERPOOL COURT OF PASSAGE, when in Admiralty it lies to a Divisional Court of the Probate, Divorce, and Admiralty Division (*The Wild Rose* v. *The J. M. Stubbs*, 1915, 85 L.J. 17); and in other cases to the COURT OF APPEAL (56 & 57 Vic. c. 37).

(VIII) **CHANCERY COURT OF THE COUNTY PALATINE OF LANCASTER.**—Unlimited Chancery jurisdiction is given if the defendant is within the area of the Court's jurisdiction (*In re Longendale Spinning Co.*, 1878, 8 C.D. 150; 38 L.T.R. 776). Appeal lies to the Court of Appeal. (*See* CHANCERY OF LANCASTER ACTS, 1850, 1854, 1890.)

(IX) **CHANCERY COURT OF THE COUNTY PALATINE OF DURHAM.**—This Court has unlimited Chancery jurisdiction if the subject-matter of the action is within the area of the County Palatine or if the defendant resides there.

Appeal lies to the Court of Appeal.

(X) **THE RAILWAY AND CANAL COMMISSION.**—This Court deals with complaints that reasonable facilities for traffic are not provided by railway or canal companies, or that undue preferences are given, or unreasonable charges made.

Appeal, which is only allowed on law, lies to the Court of Appeal (51 & 52 Vic. c. 17).

(XI) **THE SUPREME COURT OF JUDICATURE.**—This was formed in 1873 out of the existing Courts of

Queen's Bench, Common Pleas, Exchequer, Exchequer Chamber, Chancery, and Probate, Divorce, and Admiralty.

It has two branches: (*A*) **The High Court of Justice.** (*B*) **The Court of Appeal.**

(*A*) **The High Court of Justice.** This has three main divisions—

(1) KING'S BENCH; (2) CHANCERY; (3) PROBATE, DIVORCE AND ADMIRALTY.

(1) and (2) KING'S BENCH AND CHANCERY. In the King's Bench Division, any proceedings commenced by writ may be instituted other than those allotted to the Probate, Divorce, and Admiralty Division; but if certain matters, which have been allotted to Chancery by the Judicature Act, 1873, are commenced in the King's Bench, they will be transferred to Chancery at the plaintiff's expense.

Subject to the above remarks, and to certain exclusive jurisdiction of the County Court and the University Courts, and with the exception of foreign sovereigns (*Mighell* v. *Sultan of Johore*, 1894, 1 Q.B. 149), foreign ambassadors, their suite and the property of such (7 Anne, c. 12), foreign sovereign's property (*Vavasseur* v. *Krupp*, 1878, 9 C.D. 351), and title to or trespass to foreign land (*British South Africa Co.* v. *Compagna Mocambique*, 1893, A.C. 625), the King's Bench and Chancery Courts have jurisdiction over all persons and matters if the defendant is either served with the writ in England (which includes Wales) (*Jackson* v. *Spittall*, 1870, L.R. 5 C.P. 542), or if he was in England when the writ was issued and left to avoid service, in which case substituted service may be ordered (*Jay* v. *Budd*, 1898, 77 L.T.R. 335), or if leave can be obtained to serve the writ out of the jurisdiction. (*See* p. 34.)

Commercial cases are dealt with by a special Judge of the King's Bench in the Commercial Court in London or Liverpool, and on application by either party such Judge may transfer such cases to himself, and all proceedings

after such transfer will take place before him. Commercial cases are those relating to the construction of mercantile documents, affreightments, insurance, banking, and mercantile agency and mercantile usages.

The following proceedings are usually commenced in the King's Bench—

Mandamus, habeas corpus, certiorari, prohibition, quo warranto, and *petition of right,* these matters being said to be on the Crown side of the King's Bench.

The matters which must be commenced in Chancery are the following—

The administration of the estates of deceased persons, dissolution of partnerships and taking of partnership and other accounts, the redemption and foreclosure of mortgages, raising portions and other charges on land, sale and distribution of the proceeds of property subject to any lien or charge, trusts, rectification and cancellation of written documents, specific performance of contracts relating to land, partition and sale of real estates, and the wardship of infants.

Bankruptcy is allotted to the King's Bench, and Company winding up to Chancery.

(3) THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION has jurisdiction as follows—

(*a*) *Probate.* To grant and revoke probate and letters of administration, if the deceased left property situate in England (*In The Goods of Tucker,* 1864, 3 Sw. & Tr. 585).

(*b*) *Divorce.* To dissolve marriage if the parties are domiciled in England (*Ratcliff* v. *Ratcliff,* 1859, 29 L.J. P.M. 171) ; or if the wife's ante-nuptial domicile was English and the husband has obtained a decree of nullity abroad for a reason void by the rules of International Private Law (*Stathatos* v. *Stathatos,* 1912, 107 L.T.R. 592).

To grant judicial separation if both parties are resident here (*Armytage* v. *Armytage,* 1898, P.D. 178).

To grant restitution of conjugal rights if both parties were resident here when the suit commenced (*Yelverton* v. *Yelverton*, 1859, 1 Sw. & Tr. 574); or were domiciled here then (*Dicks* v. *Dicks*, 1899, 81 L.T.R. 462; *Perrin* v. *Perrin*, 1914, 111 L.T.R. 335).

To grant nullity of marriage if the marriage was celebrated here (*Simonin* v. *Mallac*, 1860, 2 Sw. & Tr. 67); or if respondent is resident here (*Roberts* v. *Brennan*, 1902, 86 L.T.R. 599); or if respondent is domiciled here (*Johnson* v. *Cooke*, 1898, 2 Ir. R. 130).

To make a Declaration of Legitimacy, if the plaintiff is or claims to be a British subject and is domiciled in England or Ireland, or claims property situate in England (21 & 22 Vic. c. 93).

(*c*) *Admiralty*. This may be *in rem*, i.e. when a claim is made against the ship or cargo, or *in personam*, when the claim is made against the shipowner.

The Court has jurisdiction in the following cases under the Admiralty Courts Acts, 1840 and 1861, and the Merchant Shipping Act, 1894—

Mortgages, if the ship is under arrest of the Court (Act, 1840, Sec. 3), or if the mortgage is registered here (Act 1861, Sec. 11).

Claims *in rem* for salvage of property, damages, wages, bottomry, and respondentia (Act 1840, Sec. 3).

All claims for salvage and towage (Act 1840, Sec. 6).

All claims for wages and disbursements (Act, 1861, Sec. 10).

Life salvage from British ships anywhere, and from foreign ones if the services were rendered partly or wholly in British waters (Act 1894, Secs. 544, 546).

Claims *in rem* for master's disbursements (Act 1894, Sec. 167).

Claims as to possession, ownership, or earnings, or employment of any ship registered in England (Act 1840, Sec. 4; Act 1861, Sec. 8).

Claims *in rem* or *in personam* arising out of an

agreement relating to the use or hire of a ship, and claims relating to carriage of goods in any ship, whether in contract or tort, unless in any of such cases any owner or part owner is domiciled in England or Wales. In case of such domicile, the action will be in the King's Bench if *in personam*, and in the County Court, whether *in rem* or *in personam*, if claim does not exceed £300 or up to any amount by written consent (*ante* p. 3) (Administration of Justice Act, 1920, Sec. 5). Semble, the King's Bench cannot entertain proceedings *in rem*.

Building, equipping, or repairing a ship if it is under arrest (Act 1861, Sec. 4).

Necessaries supplied to any foreign ship (Act 1840, Sec. 6), or to any ship elsewhere than in the port to which it belongs, provided in the latter case no owner or part owner is domiciled in England (Act 1861, Sec. 5). Apparently the Act of 1861 modifies the Act of 1840. (See *The Mecca*, 1898, P. 95.)

Of course, Admiralty jurisdiction *in rem* can be exercised over ships only when they come here. (See *The Mecca*, *ubi sap.*)

The jurisdiction *in personam* is governed by the rules for personal actions in the King's Bench, i.e. the defendant must be served with the writ here, or quit the kingdom to avoid service when substituted service may be ordered, or leave must be obtained to serve him out of the jurisdiction.

The Probate, Divorce, and Admiralty Division also has jurisdiction in questions of prize, in which appeal lies to the Judicial Committee of the Privy Council. (Admiralty Court Act, 1840, Sec. 22; and Naval Prize Act, 1864.)

Other parts or divisions of the High Court are—

(4) THE ASSIZE COURTS. These have, on circuit, all the jurisdiction of the King's Bench and Chancery; and in matrimonial causes, as prescribed by the Lord Chancellor, Lord Chief Justice, and the President of the Probat , Divorce, and Admiralty Division, the jurisdiction of the

Divorce Division (Administration of Justice Act, 1920, Part I, Sec. 1).

(5) DIVISIONAL COURTS. In the King's Bench and the Probate, Divorce, and Admiralty, Divisional Courts are formed by two or more Judges of the Division sitting together.

They hear appeals from County Courts, Petty and Quarter Sessions, on points of law stated in civil cases; the Mayor's Court, London; the Salford Hundred Court; the Bristol Tolzey and *Pie Poudre* Courts; the Vice-Chancellor's Court, Oxford and Cambridge; the Liverpool Court of Passage in Admiralty cases; and from Judges in Chambers, except in the last case in matters of practice and procedure, which go to the Court of Appeal.

(6) THE MASTERS. Attached to the High Court are officials, called Masters, who have the jurisdiction of a Judge in Chambers with certain exceptions. Judges in Chambers deal with interlocutory matters, i.e. those preliminary to trial, such as giving leave to issue a writ where required, interpleader, amendment of pleadings, discovery, security for costs, and many others as will appear later.

Most of these matters can be dealt with by a Master subject to appeal to the Judge, but Masters cannot deal with the following matters, which must be brought before the Judge (O. 54, r. 12)—

Criminal matters and those affecting the liberty of the subject.

Leave to serve writs and orders out of the jurisdiction.

Appeals from District Registrars.

Granting prohibitions.

Appointing receivers except by way of equitable execution.

Granting injunctions except as ancillary to equitable execution.

Reviewing taxation of costs.

Acknowledgments of married women.

A Master in Chancery has the same powers, but also

deals with matters referred to him by a Chancery Judge, i.e. inquiries as to debts due to and from the estate of a deceased, mortgage accounts, which matters have to be settled before a final judgment can be given.

(7) DISTRICT REGISTRARS. These officials have the same powers as a Master in the country districts for which they are appointed.

Appeals from Masters and District Registrars lie to a Judge in Chambers, thence to a Divisional Court except in practice and procedure, when it lies to the Court of Appeal.

(8) OFFICIAL REFEREES. These are officials attached to the High Court to whom cases may be referred as follows—

(*a*) *For trial.* The Court may refer a matter if the parties consent, or if the case involves prolonged examination of documents, or any scientific or local investigation, or matters of account.

Appeal lies to a Divisional Court of the King's Bench.

(*b*) *For report.* The Court may refer any particular questions on the result of which may depend the result of the action. The Judge gives judgment on the findings in the report.

(*c*) The Court may refer the assessment of damages where liability is admitted.

(*d*) The parties may agree without going into Court that an official referee shall act as arbitrator.

The Court cannot refer a dispute as to whether the property of a married woman is separate estate or not, for such questions must be dealt with by a County Court, or by a High Court Judge in Chambers (Married Women's Property Act, 1882, Sec. 171 ; and *In re Humphery*, 117 L.T.R. 6).

(9) THE SHERIFF'S COURT. This Court assesses damages where liability is admitted in an action by the defendant not entering appearance to a writ, or not delivering a defence within the proper time. The matter is brought before the Sheriff by a writ of inquiry.

(*B*) **The Court of Appeal.** The usual staff of this Court is the Master of the Rolls, and five Lords Justices of Appeal, but the following are *ex-officio* members: The Lord Chancellor, any ex-Chancellor, the Lord Chief Justice, and the President of the Probate, Divorce, and Admiralty Division.

The Court hears motions for new trials, and appeals from the High Court of Justice, Judges in Chambers in matters of practice and procedure, the Palatinate Courts of Lancaster and Durham, the Railway and Canal Commission, the Liverpool Court of Passage, except in Admiralty (*see* p. 7); and from County Courts in cases coming under the Workmen's Compensation Act, 1906; the Agricultural Holdings Act, 1908, on law; and the Representation of the People Act, 1918, as to the right to vote.

(XII) **THE HOUSE OF LORDS.**—The Court is composed of any three or more of the following: The Lord Chancellor, any ex-Chancellor, any of the six Lords of Appeal in Ordinary or any Peer who has held high judicial office, i.e. has been Lord Chancellor or a High Court Judge in England, Ireland, or Scotland, or a paid Judge of the Privy Council (an official now extinct). The House of Lords hears appeals from Courts of Appeal in England, Ireland, and Scotland.

(XIII) **THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.**—This Court is composed of the Lord Chancellor, the six Lords of Appeal in Ordinary, if Privy Councillors, and, so far as their duties in the House of Lords permit, any Privy Councillor who has held high judicial office, and Privy Councillors who are or have been Colonial or Indian High Court Judges, not exceeding five.

The Court hears appeals from Courts of Appeal in India and the Colonies, the Isle of Man and the Channel Islands, and also English Ecclesiastical appeals and appeals from the Prize Court.

All the above Courts may be classified as being—

(1) Superior Courts of Record, namely, the Palatinate

Courts, the Railway and Canal Commission, the Supreme Court of Judicature, the House of Lords, and the Judicial Committee of the Privy Council.

Their Judges have immunity for all they do while acting in a judicial capacity, even though they maliciously exceed their jurisdiction (*Anderson* v. *Gorrie*, 1895, 1 Q.B. 668; and *Taafe* v. *Downes*, 3 Moore Pl. 36*n*). They may commit for contempt whether committed in Court or not.

(2) Inferior Courts of Record, i.e. Quarter Sessions, County Courts, the Mayor's Court of London, the University Courts, the Liverpool Court of Passage, Salford Hundred Court, and Bristol Tolzey Court.

Their Judges are liable for judicial acts if they exceed their jurisdiction knowingly (*Houlden* v. *Smith*, 1850, 16 Q.B. 841), though not otherwise (*Kemp* v. *Neville*, 1861, 10 C.B., N.S. 523).

They can commit for contempt only if it is committed in Court.

(3) Inferior Courts not of record, i.e. Petty Sessions, Courts of *Pie Poudre*, the Registration Officer's Court, and Manorial Courts.

Their Judges are liable if they exceed their jurisdiction even unwittingly (11 & 12 Vic. c. 44, Sec. 2; *Polley* v. *Fordham*, 1904, 91 L.T.R. 525).

They have no power to commit for contempt.

Courts of Record were so called because a record of their proceedings was and is kept, and these records operate as estoppels, i.e. they are conclusive evidence of what is stated therein.

Inferior Courts are subject to the supervision of the High Courts by writs of Mandamus ordering them to try cases if they refuse to do so, of Prohibition prohibiting them from trying a case in which they have no jurisdiction, and of Certiorari removing a case or judgment from them to the High Court.

PART II

PROCEDURE COMMON TO KING'S BENCH AND CHANCERY

CHAPTER I

DIFFERENT WAYS OF COMMENCING PROCEEDINGS—MATTERS TO BE CONSIDERED BEFORE ISSUING WRIT—SERVICE OF WRIT AND APPEARANCE

LEGAL proceedings may be begun in any of six different ways—

(1) **By Writ of Summons.** This is a written order in the name of the King and witnessed by the Lord Chancellor, or, if there is no Chancellor, by the Lord Chief Justice, requiring the defendant to enter an appearance in the Central Office of the High Court, or in a District Registry within eight days after service of the writ on him under penalty of having judgment signed against him. (For form of writ, *see* Appendix.) The writ sets out, *inter alia*, the plaintiff's claim against the defendant.

(2) **Originating Summons.** This is any summons other than one in a pending cause or matter; it is a summons which commences a proceeding, whereas the other kind, interlocutory, is taken out after the action has been commenced by writ.

A summons is a written order from a Judge or Master, calling on a defendant to enter an appearance and appear before him in Chambers on the hearing of the plaintiff's application.

Such summonses are used in the King's Bench to order a solicitor to deliver up a deed and for interpleader, and in Chancery to get the Court's opinion as to the meaning of a document, to foreclose mortgages to settle disputes between vendors and purchasers of land, and matters arising out of trusts where the property is under £1,000.

The advantages of an originating summons are that the matter is settled speedily as there are no pleadings, and also it is cheaper than proceedings by writ, and is heard privately in Chambers.

(3) **Petition.** This is a written application to the Court and is used for lengthy matters and chiefly in Chancery. It is used to wind up a company, and in matters arising out of trusts where the property is £1,000 or more; in the King's Bench it is used to make a person bankrupt.

(4) **Motion.** This is a verbal application to the Court made by counsel. It is used to get an order to commit for contempt, and to strike a solicitor off the rolls.

In proceedings commenced by summons, petition, or motion, the evidence must be given by affidavit.

(5) **Special Case.** This can be used where the parties are agreed as to the facts, and only require a declaration as to the law (O. 34, r. 1).

(6) **Replevin.** This is a method of determining the validity of a distress of goods for rent, or cattle damage feasant, and the first step is taken in the County Court. The party whose property has been seized applies to the Registrar of the County Court to order the distrainor to withdraw until the matter has been determined, which order will be made on the applicant giving security to commence in the County Court, within a month, an action against the distrainor, and if he loses it to restore the goods to him. If the applicant undertakes to prove that the claim in respect of which the distress was made exceeds £20, or that the title to some corporeal or incorporeal hereditament whereof the rent or annual value exceeded £20, or that some toll, fair, or market is in question, he may, on giving security to commence an action in the High Court within a week, bring his action there. The defendant may, on similar grounds, and on giving security to prove the above matters, get the action transferred to the High Court by *certiorari*.

IN CERTAIN CASES A PARTY MAY REDRESS HIS WRONGS HIMSELF INSTEAD OF APPLYING TO THE COURT; the chief cases are the following—

Distress for rent, or trespass by cattle.

Recaption, or the peaceable retaking of one's own goods wherever they can be found.

Re-entry on land peaceably.

Self-defence.

Abatement or stopping a nuisance.

The most usual way of commencing a proceeding in the King's Bench is by writ, and so it is proposed to deal with that method first, leaving originating summons, petitions, and motions for the portion of the work devoted to Chancery. Of course, writs are used in Chancery with equal frequency, and the procedure is in most cases similar to that in the King's Bench; any respects in which there is a difference will be pointed out in the appropriate place.

MATTERS PRELIMINARY TO ISSUE OF WRIT

Before issuing a writ, the following matters should be considered, in addition to the particular Division in which to commence—

(1) Is leave to sue necessary?

(2) Who are the proper parties to sue and be sued?

(3) To what extent may different parties join or be joined in the same writ?

(4) To what extent may different causes of action be joined in the same writ?

(5) When may different parties join, or have joined against them, different causes of action in the same writ?

Each of these will be dealt with in turn.

(1) LEAVE TO SUE IS NECESSARY IN THE FOLLOWING CASES—

(*a*) If the plaintiff has been declared a vexatious litigant under the Vexatious Actions Act, 1896, under which, if a party is continually suing without cause, the Attorney-General may apply to have him declared

a vexatious litigant, and if so declared he cannot sue without leave of Court. The Act does not apply to criminal proceedings (*R.* v. *Boaler*, 1914, 111 L.T.R. 497).

(*b*) If it is desired to issue a writ for service out of the jurisdiction, leave of a Judge in Chambers is required (O. 11, r. 1).

(*c*) When it is desired to join in the same writ causes of action which cannot be joined without leave. Leave of a Master is sufficient.

(*d*) If the Committee of a lunatic desires to sue, he must get leave from a Lord Justice.

(*e*) If a party desires to sue or defend in *formâ pauperis*, he must get leave of the Court by satisfying the Court that he is not worth more than £50, or in special circumstances £100 (wearing apparel, tools of trade, and the subject-matter of the suit excepted). The Court may, on a report from counsel or solicitor to whom the matter has been referred, assign solicitor and counsel to the applicant for the purpose of the action (O. 16, rr. 22–31).

(2) THE PROPER PARTIES TO SUE AND BE SUED—

An adult, *compos mentis*, will sue and be sued in his individual name and capacity; and if he carries on business in a firm name he must still sue in his own name though he may be sued in his firm name (O. 48, r. 11).

An infant sues by his next friend, who must file a written consent to act before action is commenced (O. 16, r. 20) and is liable for costs.

An infant is sued in his own name, but appearance must be entered by his guardian *ad litem* who is not liable for costs.

A lunatic not so found sues and is sued in the same way as an infant.

A lunatic so found sues and is sued by his Committee, but leave of a Lord Justice must be obtained to enable the Committee to sue.

Partners may sue and be sued in the firm name, but if so suing can be compelled to disclose to the defendant, on

receipt of written notice from him, the names and addresses of every member of the firm under penalty of having the action struck out (O. 48*a*, r. 1).

Corporations and limited companies sue and are sued in the corporate name.

A Registered Trade Union may sue and be sued in its registered name (*Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants*, 1901, A.C. 426).

Trustees may sue and be sued on matters arising out of the trust without joining the beneficiaries, though the Court may order them to be joined later on, or to be served with notice of judgment so that they may apply to have it set aside if they think fit.

Executors and Administrators. All the former who have proved the will, and all the latter must sue and be sued in matters affecting the estate.

Where parties sue or are sued in a representative capacity, this should be stated in the indorsement on the writ, e.g. " the plaintiff is the executor of A deceased."

In actions to recover land, the plaintiff should be the person entitled to immediate possession, and the defendant the person in actual possession (*Minet* v. *Johnson*, 1890, 63 L.T.R. 507).

(3) WHEN TWO OR MORE PERSONS MAY JOIN IN A WRIT AS CO-PLAINTIFFS, OR BE JOINED AS CO-DEFENDANTS.

(*a*) *Plaintiffs.* **By O. 16, r. 1, any number of persons may join in a writ as co-plaintiffs if the cause of action arises out of the same transaction, or series of transactions, and involves a common question of law or fact.**

So a landlord and tenant may join to claim an injunction in respect of a nuisance to the house (*Gort & ors.* v. *Rowney*, 1886, 54 L.T.R. 817); and owners of different houses affected in different degrees by the act of one defendant may join (*The House Property Co.* v. *The Horse Nail Co.*, 1885, 29 C.D. 190); and different shareholders induced to subscribe for shares by a fraudulent prospectus may join (*Drincqbier* v. *Wood*, 1899, 1 Ch. 393); and a

class of persons libelled by the same paragraph, and as such may join (*Booth & ors.* v. *Briscoe*, 1877, 2. Q.B.D. 496). But the transaction must be the same, not merely the same kind, so if A B and C are libelled as individuals by the same paragraph in a newspaper, they cannot join (*Peddie* v. *Kyle* [1900], 2 Ir. 265). Joint claimants in contract, or in tort arising out of contract, must all be joined, and those who will not do so may, after tender of indemnity for costs, be joined as defendants by the other plaintiffs (*Cullen* v. *Knowles & Birks*, 1898, 2 Q.B. 380).

If all joint claimants are dead, the personal representative of the one who died last should sue.

If claimants have a joint and several claim, apparently they need not all join, though there appears to be no authority.

A joint and several claim exists where two or more persons claim or are liable on separate obligations in respect of the same transaction; in such a case only payment or something similar frees all.

A joint claim exists where two or more persons claim, or are liable in respect of the same obligation, there being only one obligation; anything extinguishing the obligation extinguishes the right and liability of all.

Where there are numerous persons having the same interest in one cause of action, one or more of them may sue on behalf of himself and the rest (*Warrick* v. *Queen's College, Oxford*, 1871, L.R. 6 Ch. 716; *Temperton* v. *Russell*, 1893, 1 Q.B. 435).

(*b*) *Defendants.* **By O. 16, r. 4, all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative.**

But apparently the cause of action must arise from the same transaction, or series of transactions.

So a principal and agent may be sued on a contract made with the agent where the principal denies the agent had authority, and a claim is made against them alternatively, i.e. against the principal on the contract, and

against the agent on the warranty of authority (*Massey* v. *Heynes*, 1888, 21 Q.B.D. 330). And if a party is induced to subscribe for shares in a company by a fraudulent prospectus, he may sue the company and the promoters in the same action, claiming rescission and return of his money from the company, and damages from the promoters (*Frankenberg* v. *Great Horseless Carriage Co.*, 81 L.T.R 684). And if several persons conspire to injure X he may join them. But the cause of action must be the same, not merely similar. So if different newspapers libel X, having copied the matter from one another, X cannot join them, but must bring separate actions against each, for they are distinct libels (*Colledge* v. *Pike*, 1887, 56 L.T.R. 124); but under O. 49, r. 8, if actions are in the same Division, either party may apply to have the actions consolidated so that they will all come on for hearing at the same time (*Martin* v. *Martin & Co.*, 1897, 76 L.T.R. 44), or as an alternative the Court may stay all the actions save one which will be tried as a test action. But this can only be done if the other defendants agree to be bound by the result of the one action (*Colledge* v. *Pike* [*supra*]).

Again, in *Sadler* v. *G.W. Ry. & M. Ry.*, 1896, 74 L.T.R. 561, where the carts of one defendant obstructed access to the plaintiff's premises on one side, and the carts of the other defendant obstructed access on the other side, it was held they could not be joined in the same writ, though had they been acting in concert they might have been joined in a claim for conspiracy.

In the case of a claim against two or more jointly, a judgment against one, even though unsatisfied, will prevent a fresh action against the rest, except where they are all sued and judgment is signed against some of them (1) in default of appearances under O. 13, rr. 4 & 6; or (2) in default of defence under O. 27, r. 3; or (3) under O. 14, r. 5, where some are allowed to defend and others not; or (4) where they appear separately at different times and

the plaintiff applies under O. 14 against them separately and gets judgment against some of them. In all these cases, he can go on against the rest (*Annual Practice*, 1921, p. 346).

If a party claims against two defendants on separate causes of action arising out of the same transactions, a judgment against one will not prevent him continuing the action against the other, as in *Ch. Goldrei Foucard & Son* v. *Sinclair & ors.* ([1918] 1 K.B. 180), where the plaintiff claimed in the same action rescission of a contract and return of his money against one defendant and damages against the other for fraudulent misrepresentation, and having obtained judgment in default of defence against the former, was held entitled to continue against the latter.

In case of a claim against two defendants in the alternative, any judgment against one prevents any further proceedings against the other (*Moore* v. *Flanagan and wife*, 122 L.T.R. 738).

Where there are numerous persons having the same interest in a matter, one or more may be sued or may be authorized by the Court or Judge to defend on behalf of all (O. 16, r. 9).

(4) JOINDER OF CAUSES OF ACTION—

By O. 18 a plaintiff may join in the same writ any number of causes of action against the same defendant (subject to the power of a Master to strike out any which he thinks it would be inconvenient to have tried together), with the following exceptions—

(*a*) In an action for recovery of land, no other claims may be joined without leave of a Master, except claims for mesne profits, arrears of rent, double yearly value for holding over, and damages for breach of covenant contained in the lease of the house on the land.

(*b*) A trustee in bankruptcy may not, without leave of a Master, join claims in a representative capacity with those in a personal one.

(*c*) Executors and administrators may not, even with leave, join nor have joined against them claims in a representative capacity with those in a personal one, unless the latter arise out of the executorship or of the administratorship, in which cases they may be joined without leave.

(5) JOINDER OF PARTIES AND CAUSES—

If two or more persons have a joint claim against a defendant, they may each join separate claims against him subject to the rules as to joining causes of action (O. 18 r. 6).

But they must have a joint claim ; so in *Stroud* v. *Lawson & ors.*, 1898, 2 Q.B. 44, it was held that a plaintiff could not, as an individual, sue the directors for damages for fraud in respect of the prospectus, and also on behalf of himself and all other shareholders, for a declaration that an interim dividend had been illegally declared, for the action was to be treated as one in which there were two plaintiffs and there was no joint claim.

If a husband and wife have a claim against the same defendant, they may join separate claims against him, subject to the rules as to joinder of causes of action (O. 18, r. 4).

If a plaintiff has a claim against two or more defendants, he may not join claims against them separately unless they are husband and wife, and even then only subject to the rules as to joinder of causes of action (O. 18, r. 4).

EXTRA NOTE *Re* PARTIES TO AN ACTION

While dealing with parties, it will be convenient to point out the different ways in which parties may be brought into an action after issue of the writ.

(*a*) Where a plaintiff ought to have joined other parties as co-plaintiffs, he may apply to a Master for leave to amend the writ and add them (O. 16, r. 2), or the defendant may apply to have them joined (*Beckett* v. *Ramsdale*, 1886, 31 Ch. D. 188).

(*b*) Where a cause of action is transmitted by death, marriage, bankruptcy, or other means, the person in whom it vests may apply to be substituted for the original plaintiff; if a liability is so transmitted, the plaintiff may apply to have the person so made liable substituted for the defendant (O. 17, rr. 1–4); the order, if made, will be served on the defendant or on such party sought to be made liable respectively, and he may apply to have it discharged if he thinks it is improperly made, as it is made *ex parte* in the first instance.

(*c*) Where, under *bonâ fide* mistake the wrong persons have been made parties either as plaintiffs or defendants, application may be made to a Master to be allowed to substitute the right parties (O. 16, r. 11).

So, if an action is brought against a lessee who is abroad, for recovery of premises which are in the occupation of his wife, the Court may substitute the wife as a person claiming under the lessor (*Artisans, etc., General Dwellings Co.* v. *Clifford*, 119 L.T.R. 209). But if an action is commenced in the name of a deceased person, his personal representatives cannot be substituted (*Tetlow* v. *Oreca, Ltd.*, 123 L.T.R. 388).

(*d*) The Court may, in actions for administration, or for the execution of the trusts of any deed or instrument, order parties to be added (O. 16, r. 39).

(*e*) Parties may be added by third party procedure. This applies where a defendant claims that if he is liable to the plaintiff, some third person is liable to indemnify him against such claim, or to contribute towards payment of it. If such person is already a party to the action, e.g. a co-defendant, then the defendant serves on the third party a third party notice setting out his claim for indemnity or contribution, and also a copy of the statement of claim, or, if none, of the writ. If the third party is not already a party to the action, then he can be brought into it by the defendant getting leave of the Court to serve such notice, which is sealed with the seal of the Court.

In either case, the third party must enter appearance to the notice, if he desires to dispute the claim. If he does not enter appearance, the defendant may either let the plaintiff get judgment against him by not defending it, and after paying the plaintiff, or by leave, before so doing, sign judgment against the third party; or instead, he may fight the plaintiff's claim, and if found liable to him, ask for judgment against the third party. If the third party enters appearance to the notice, then his liability will be determined at the hearing of the plaintiff's claim.

(*f*) A new party may be brought in by way of counter-claim, where the defendant has a cross-claim against the plaintiff and another person jointly, provided the cross-claim is connected with the claim (Judicature Act, 1873, Sec. 24 (3)). In such case, the defendant will, in his defence, plead such cross-claim and serve a copy of his defence on the third person as well as on the plaintiff; indorsed on the copy delivered to the new party will be a notice that the new party must enter appearance within eight days, and that in default judgment may be given against him. The new party may then enter appearance and deliver a reply to the counterclaim (O. 21, r. 11).

An example of this is given on page 27.

THE ISSUE OF THE WRIT

The procedure for issuing a writ is to fill up two forms on the face with the Division of the High Court in which the plaintiff intends to sue and with the names of the parties. On the back is indorsed the representative capacity, if any, in which the parties sue or are sued, and if a woman is suing, a statement as to whether she is a spinster, a widow, or a married woman. There will also be indorsed the plaintiff's claim, and in addition the name and business address of the plaintiff's solicitor, if he employs one. There must also be indorsed, if neither the

IN THE HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION. 19.. B 65

BETWEEN *A B* PLAINTIFF

AND

C D DEFENDANT

(By original action)

AND BETWEEN the said *C D* Plaintiff

AND

The said *A B* and *E F* Defendants

(By Counterclaim)

DEFENCE AND COUNTERCLAIM

DEFENCE

1. The defendant denies that he agreed to purchase the goods referred to in par. 1 of the Statement of Claim or any of them as alleged or at all.

COUNTERCLAIM

2. If the defendant agreed to purchase the goods referred to in par. 1 of the Statement of Claim, which is denied, he did so in consideration of a verbal joint warranty given by the plaintiff and E F on the said day of that the said goods were made by one X.

3. The said goods were not made by the said X.

4. The defendant counterclaims against the plaintiff and the said E F for damages for breach of the warranty referred to in par. 2 hereof.

plaintiff nor his solicitor carries on business within three miles from the High Court of Justice, an address for service within such three miles, at which written communications may be delivered to the plaintiff.

The two copies are taken to the Writ Department of the Central Office of the High Court of Justice, or to a District Registry, with an office copy of any order giving leave to sue; the papers are handed in with the proper fee; the office stamps one with the fee stamp and files it, the other it seals with the official seal and hands it back; this latter one is the writ.

The writ is marked by the Office with a letter, the initial letter of the plaintiff's own name, and also with a number; in the Chancery Division the name of the Judge to whom the action is assigned is also put on the writ.

INDORSEMENTS OF CLAIM

There must be indorsed on the writ the claim the plaintiff makes against the defendant.

There are **three ways of indorsing a claim on a writ.**

(1) Generally.

(2) Specially.

(3) For an account.

Each of these is dealt with in turn.

(1) **General Indorsement.** A general indorsement merely indicates the nature of the plaintiff's claim without giving details, and is followed, in due course, by a Statement of Claim setting out such details.

Examples of General Indorsements

The plaintiff's claim is for damages for assault.

The plaintiff's claim is for damages for breach of promise of marriage.

N.B.—In libel, the publication in which the libel appeared must be stated; e.g. The plaintiff's claim is for damages for a libel appearing in *The Times* newspaper of 1st January, 19...

(2) **Special Indorsement.** This sets out full particulars of the claim, and is headed "Statement of Claim."

Examples of Special Indorsements

I

Statement of Claim

The Plaintiff's claim is for £60 for goods sold and delivered by the Plaintiff to the Defendant at the Defendant's request.

Particulars.

19..		
Jan. 1.	To one Captain's Uniform .	£90
,, 3.	*Cr.* By cash	£30
	Balance	£60

II

Statement of Claim

The Plaintiff's claim is for £105 (due on a bill of exchange dated 1st January, 19.., drawn by the Defendant A and accepted by the Defendant B payable to the Plaintiff on demand, which said bill was duly presented to the Defendant B on 30th January, 19.., and dishonoured by him, of which dishonour written notice was duly given to the Defendant A on the same day.

Particulars.

To amount of bill.	£104
Cost of protesting.	1
	£105

And the Plaintiff claims interest on the said bill at 5 per cent. per annum till payment or judgment.

A Special Indorsement may only be used in the cases provided for by O. 3, r. 6, namely—

1. Where the plaintiff claims a Liquidated amount under a contract, express or implied, or on a bond, or a

Statute (not being a penalty) or a guarantee (where the claim against the principal debtor is a liquidated one), or on a trust; or

2. Where the action is brought by a landlord against a tenant to recover the land because the term has expired, or been determined by notice to quit, or has been forfeited for non-payment of rent, but not if forfeited for breach of any other covenant.

The landlord may also join a claim for rent or for mesne profits.

A LIQUIDATED claim is one which is fixed and definite, by agreement of the parties, or can be made so by a mathematical process. For example, money lent, money due on a judgment, damages for wrongful dismissal if the time for which the plaintiff was entitled to notice of dismissal has expired, for then the exact damages can be ascertained; but as in most of such cases the length of notice is a question for the jury as to what is reasonable, it will not generally be possible to indorse specially for wrongful dismissal.

As regards specially indorsing for interest, this may be done in the following cases only—

1. Where there is an agreement to pay interest, express or implied, duly alleged in the indorsement.

2. Where there is a statute giving a right to interest at a fixed rate; e.g. Judgments Act, 1 & 2 Vic. c. 110, on judgments.

3. Where the action is on a common money bond conditioned for repayment of half the amount with interest (*Gerrard* v. *Clowes*, 1892, 2 Q.B. 11).

4. Where the principal money is claimed on a bill of exchange, cheque, or promissory note (Bills of Exchange Act, 1882, Sec. 57 (1) and (2)).

Interest must only be claimed up to the date of the writ, except in case (4) when it may be claimed up to payment or judgment; but in all cases where interest is claimable and judgment is obtained, interest will, of

course, be given by the judgment up to the date of the judgment.

In two cases only may UNLIQUIDATED claims be specially indorsed—

1. Mesne profits.

2. Interest on bills of exchange, notes, and cheques up to judgment.

As regards the recovery of land, the writ should be specially indorsed only where there has been no change of title, i.e. where the action is between the two original parties to the lease (*Casey* v. *Hellyer*, 1886, 17 Q.B.D. 97).

The advantage of specially indorsing a writ is that if the defendant does not enter appearance within eight days after service of the writ or, having entered appearance, does not deliver a defence within ten days after entering appearance, the plaintiff may, without any leave, sign judgment against him; and even if the defendant does enter appearance, the plaintiff may still apply to a Master under O. 14 for leave to sign judgment on the ground that the defendant has no defence and has entered appearance only for the sake of delay; moreover, the plaintiff need not take out a summons for directions, and need not and indeed may not deliver a Statement of Claim, as the special indorsement is a statement of claim.

If a writ is specially indorsed partly with claims which ought not to be so indorsed, the matter may be dealt with by the Master in case of an application under O. 14, in the manner set out on page 44.

(3) **Indorsement for an Account.** This must always be done where the plaintiff desires an account to be taken, as where a principal requires an account of moneys received for him by his agent.

The advantage of such an indorsement is that if the defendant does not enter appearance, or enters it but does not satisfy the Court that there is some preliminary matter to be settled, the Court will, on the plaintiff's application, order the account to be taken without further proceedings.

EXAMPLE

The plaintiff's claim is that an account be taken of all moneys received by the defendant for, and on account of, the plaintiff between 1st January, 19.., and 31st December, 19.., both days inclusive.

SERVICE OF THE WRIT

There are **four different ways of effecting service of a writ**—

(1) Personal service.
(2) Substituted service.
(3) Service out of the jurisdiction.
(4) Acceptance of service by the defendant's solicitor.

Each of these is considered in turn—

(1) **Personal Service.** This is effected, in case of an individual defendant not under a disability, by delivering to him in person a copy of the writ and, if he requires it, showing him the original; if there are two or more defendants, each must be so served unless they are partners and the action is against the firm.

In the case of INFANTS, service should be effected on the father, or guardian, or, if none, on the person under whose care the infant is; but service on the infant himself is good if sanctioned by the Court either before or after such service (O. 9, r. 4).

As regards LUNATICS, if so found by inquisition, service should be effected on the committee, or, if none, on the person in whose charge the lunatic is, or with whom he resides; if the lunatic is not so found, service should be on one of the latter two persons, though in each case the Court may order service on any one else (O. 9, r. 5).

A PARTNERSHIP is served by serving any of the partners anywhere, or by serving at the principal place of business any person having management there, serving him at the same time with a written notice stating he is served as a person having management. In default of such notice,

he will be deemed served as a partner, and if not a partner the service is bad (O. 48a, rr. 3 & 4).

The advantage of serving every member of a firm is that, in default of appearance by any one of them, judgment may be signed against such one, and his separate property be taken in execution, whereas such property cannot be taken without leave of Court if he has not been so served (O. 48a, r. 8).

If the firm has been dissolved before issue of the writ, the writ must be served on every member whom it is sought to make liable.

AN INDIVIDUAL CARRYING ON BUSINESS IN A FIRM NAME is served in the same way as a partnership (O. 48a, r. 11).

A CORPORATION, other than a registered company, or a trade union, is served by serving the writ on its head officer, the town clerk, treasurer, or secretary (O. 9, r. 8).

A COMPANY REGISTERED under the Companies Act, 1908, or a trade union is served by leaving the writ with, or sending it by post in a prepaid letter addressed to, the company or trade union at its registered office (Companies Consolidation Act, 1908; Trade Union Act, 1871, Sec. 9).

A HUNDRED or other like district is served by serving the High Constable, or, if none, the chief officer of the County Police.

In the case of a BUILDING SOCIETY, if it is incorporated under the Act of 1874, service should be effected personally on the treasurer, secretary, or head officer; if not incorporated, then the trustees of the society should be each served.

A MEMBERS' CLUB cannot be sued (*Grossman* v. *The Granville Club*, 1884, 28 S.J. 513); such members of the committee as are liable should be sued and served.

A PROPRIETARY CLUB may be treated as a partnership, the persons who carry it on being deemed the members of the firm and suable, the other members of the club not being liable (*Firmin* v. *The International Club*, 1889, 5 T.L.R. 612, 694).

In case of an action to RECOVER LAND, where the possession is vacant, the writ may be served by posting it up on the premises; if, however, it is desired to be able to sign judgment in default of appearance, leave of a Master so to serve it should be first obtained (O. 9, r. 9).

(2) **Substituted Service.** (O. 10.) Where a defendant, who is in England or Wales when the writ is issued, cannot be found, either because he is evading service, or because his whereabouts are not known, and it is proved by affidavit that efforts have been made to find him, i.e. that one call followed by two or more after making appointments have been made at his residence, or, if his residence is unknown, at his business place, and also that substitute service or notice in lieu of service will probably come to his knowledge, leave may be obtained from a Master for substituted service by post, or by serving defendant's manager, or by advertisement. A copy of the order authorizing such service must, where possible, be served as well.

In Chancery, the actual order must be made by the Judge, though the application is made to the Master who procures the order from the Judge.

(3) **Service out of the Jurisdiction.** Where the defendant is in neither England nor Wales, leave must be obtained to issue the writ and serve it, or in some cases notice of it, out of the jurisdiction.

This leave can be obtained from a Judge only, and only in the following case as provided by O. 11, r. 1; namely, if

(*a*) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits), or the perpetuation of testimony relating to land within the jurisdiction.

(*b*) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside, or enforced in the action.

(*c*) Any relief is sought against any person domiciled, or ordinarily resident within the jurisdiction.

(*d*) The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, and which ought to be executed according to the law of England.

(*e*) The action is to enforce, rescind, or dissolve, or otherwise effect a contract

(1) Made here; or

(2) Made by an agent trading or residing here; or

(3) By its terms, or by implication, to be governed by English law; or

(4) Unless the defendant is domiciled in Scotland or Ireland, the action is founded on the breach or any alleged breach within the jurisdiction of any contract, wherever made, even though a breach out of the jurisdiction rendered impossible performance of the part of the contract which ought to have been performed within the jurisdiction.

(*ee*) The action is in respect of a tort committed within the jurisdiction.

(*f*) An injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof.

(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

If a party not subject to the jurisdiction agrees to submit to it and accepts service of the writ, the action is not properly brought against him, so service on another party who is out of the jurisdiction will not be allowed (*John Russell & Co.* v. *Cayzer, Irvine & Co.*, 115 L.T.R. 87).

(*h*) The action is by a mortgagee or mortgagor or by their successors in respect of a mortgage, lien, or charge relating to personal property situate within the jurisdiction, not being an action seeking personal judgment.

The leave can only be given in the above cases (*In re Eager, Eager* v. *Johnston*, 1883, 22 C.D. 86).

Application for the leave is made *ex parte* to a Judge in Chambers by an affidavit setting out—

(1) That the plaintiff believes he has a good cause of action (which must be one of those coming under O. 11, r. 1).

(2) Where the defendant is or may be found.

(3) Whether the defendant is a British subject (unless he is in Scotland or Ireland).

(4) The amount or value of the property in dispute.

(5) If the defendant resides in Scotland or Ireland, whether there is a local Court, and, if so, the comparative cost and convenience of proceeding in England.

(6) If the application is under par. (*g*) of O. 11, r. 1, that the defendant who is within the jurisdiction has been properly served.

If the defendant is neither a British subject nor within the British dominions, notice of the writ is served instead of the writ.

In Germany, Russia, France, Spain, Belgium, and Portugal, to which countries the Lord Chancellor has applied Rule 8 of O. 11, the notice is served through the Foreign Office.

If the defendant carries on business here by an agent and service out of the jurisdiction is impossible, an order may be made for substituted service on the agent of notice of the writ, if notice of such service will probably reach the defendant (*Porter* v *Freudenberg*, 1915, 112 L T.R. 313).

By O. 11, r. 8a, " the Court or a Judge may direct that any summons, order, or notice shall be served on any party or person in a foreign country, and the procedure prescribed by O. 11, r. 8, with reference to serving notice

of a writ of summons shall apply to the service of any summons, order, or notice so directed to be served."

Under this rule, an originating summons may be served out of the jurisdiction by serving notice of it.

(4) **Accepting Service.** The defendant's solicitor may, if authorized, undertake in writing to accept service for the defendant, and to enter appearance thereto; this undertaking is usually indorsed on the writ, and a copy of the writ may then be left with the solicitor, and service thus effected.

If the solicitor was not authorized to accept service or does not enter appearance, he is liable for contempt and in damages, though, of course, the service is bad (O. 9, r. 1).

SOME MISCELLANEOUS MATTERS RELATING TO WRITS

Time within which a Writ must be Served. A writ must be served within twelve months after issue, though if service is impossible an application may be made before the twelve months have expired, or even afterwards if the Statutes of Limitation have not barred the claim (*Douglas* v. *Kaufman*, 1878, 3 Q.B.D. 7, 3 0), for a renewal of the writ for six months, and so on from time to time (O. 8, *r.* 1).

The object of this is to prevent the Statutes of Limitation running, as the mere issue of the writ has such effect so long as the writ is in force.

A Lost Writ may, on an order obtained from a Master, be replaced by a copy sealed with the seal of the Court (O. 8, r. 3).

Concurrent Writs. These are duplicate originals, and are useful if there are several defendants to be served, or where the defendant may be in any one of various places.

Amendment of a Writ. A writ may be amended by leave of a Master or, if it is specially indorsed, the indorsement may be amended once without leave, provided in the

latter case the rules relating to amendment of Statements of Claim are complied with. (*See* p. 49 and O. 28, rr. 1 & 2.) A copy of the amended writ must be delivered to the defendant or his solicitor, as the case may be.

Issue of Writ by a Party's Solicitor. In this case the solicitor must indorse on the writ his name and business address, and if such address is not within three miles of the Central Office, or, if the writ is issued from a District Registry, is not within such District, must indorse an address for service within such three miles or within such District respectively.

Change of Solicitor. Either party can change his solicitor after action begun by filing notice of the change in the Central Office or in a District Registry if the writ was issued therefrom. Notice must be served on the solicitor for the other parties, and, if the action has been entered for trial, notice must be left with the Associate in the King's Bench and the Judge's Clerk in Chancery.

APPEARANCE

When a writ has been duly served, there must be indorsed on it within three days the fact that it has been so served.

The defendant should, within eight days after the service, enter appearance in the Central Office, or at a District Registry if the writ was issued from one and the defendant resides or carries on business in the District; if he does not reside or carry on business there, he may enter appearance in either place.

A defendant may, without leave, enter appearance at any time before the plaintiff has obtained judgment in default of appearance.

Appearance is entered by filling up a memorandum of appearance requesting that appearance be entered; the memorandum must also contain an address for service either within three miles of the Central Office or within the District of the District Registry from which the writ

was issued. Appearance is generally entered by the defendant's solicitor, who in such case must sign the memorandum.

Written notice that appearance has been entered must be given to the plaintiff if he sues in person, otherwise to his solicitor.

Partners sued in the firm name must enter appearance individually; any person served as a partner who denies that he is one, should enter appearance under protest so as to raise the point at the earliest moment, and get his costs if he succeeds in the action on that point.

A person sued in a firm name must enter appearance in his own name.

An infant and a lunatic not so found enter appearance by a guardian *ad litem.*

A lunatic so found enters appearance by his Committee.

Appearance by Person not Named in Writ. Sometimes persons not named in the writ as defendants may enter appearance; the persons who may do so are the following—

(1) In probate actions, and in Admiralty actions *in rem*, persons interested in the estate or *res* respectively may intervene and enter appearance (O. 12, rr. 23 & 24). If they have notice of the action and do not intervene, they are bound by the judgment (*Young* v. *Holloway*, 1895, P.87).

(2) The guardian *ad litem* of an infant, or of a lunatic not so found.

(3) The Committee of a lunatic so found.

(4) A partner where the writ is issued against the firm in the firm name.

(5) A landlord where a writ of ejectment has been served on the tenant by some person other than the landlord. The landlord must get leave by filing an affidavit that he is in possession by himself or his tenant. Such appearance may state that the defence is limited to any particular part or parts of the property.

By the Common Law Procedure Act, 1852, Sec. 209,

a tenant on being served with a writ of ejectment by a person other than the landlord must forthwith give the landlord notice under penalty of forfeiting three years' improved value of the land.

Steps a Defendant may take before Entering Appearance. The only steps a defendant may take before entering appearance are the following—

(1) Apply to set aside the writ, or the service of it, or the order authorizing such service (O. 12, r. 30).

N.B. By entering unconditional appearance, the defendant waives any irregularity in respect of the above matters, though by leave of a Master he may enter conditional appearance without thereby waiving his objection.

(2) Apply to a Master to have the case transferred to the County Court (County Courts Act, 1919, Secs. 1 & 2), or apply to the Commercial Judge to have the case transferred to the Commercial List (*Barry* v. *Peruvian Corporation*, 1896, 1 Q.B. 208). (*See* p. 72.)

(3) Pay the plaintiff the amount of his claim.

(4) Interplead (O. 57, r. 4).

Note.—INTERPLEADER is a method of relief open to a party who is in possession of property in which he claims no interest, except for costs and charges, or who owes a debt, which property or debt is claimed from him by two or more claiming adversely to one another. The party against whom the claim is made takes out an Interpleader summons calling on the claimants to come before a Master and state the nature and particulars of their claim, and abide by the order the Master makes as to how the dispute shall be settled. The interpleading party, unless he is a sheriff interpleading in respect of goods seized by him in execution and claimed by someone, must at the hearing of the summons prove by affidavit—

(1) That he does not collude with either party.

(2) That he claims no interest in the subject-matter except for costs and charges.

(3) That he is willing to bring the subject-matter into Court or to dispose of it otherwise as the Court may order.

The Master may order that any claimant be made a defendant in an action already commenced in respect of the subject-matter in dispute, or, if no action has been commenced, may direct an issue between the claimants to be stated and tried and declare who shall be plaintiff and who defendant.

If the amount does not exceed £500, the Master may remit the trial of the issue to the County Court.

If both claimants request it, or if one of them does so and the value of the subject-matter is small, i.e. not over £50, the Master may decide the matter, but an appeal will lie from his decision to a Judge in Chambers (*Clench* v. *Dooley*, 1887, 56 L.T. 122), whose decision will be final (*In re Tarn*, 1893, 68 L.T. 311).

Where there is only a question of law, the facts not being in dispute, the Master may either decide the matter himself, or order a special case to be stated for the opinion of the Court. The rules as to appeal, if the Master decides the point of law, are as stated above.

In all cases, the Interpleading party is dismissed from the proceedings with his costs.

Steps Plaintiff may take in Default of Appearance. (O. 13.) If the defendant is an infant or lunatic not so found, the plaintiff must, if he desires the action to proceed, apply to a Master to have a guardian *ad litem* appointed to enter appearance. The application is supported by an affidavit, showing that the writ has been served and the service indorsed thereon within three days thereafter, and also that notice of the application has been given to the person who has care of the infant.

If the defendant is not under a disability, then the plaintiff should file in the Central Office or District Registry, as the case may be, an affidavit that the writ has been served and service indorsed on it within three days

thereafter, and then may proceed according to the nature of the case as follows—

(1) If the claim is for liquidated damages, or the writ is specially indorsed, he may sign final judgment, and issue execution.

(2) If the claim is for unliquidated damages, he signs interlocutory judgment and takes out a writ of inquiry directing the sheriff to empanel a jury to assess the damages.

(3) If the claim is for recovery of land, he signs judgment and takes out a writ of possession to get the sheriff to put him in possession of the land.

(4) If the action is for the recovery of goods, he signs interlocutory judgment, and takes out a writ of inquiry to have the value of the goods assessed.

(5) If the action is for an account, he applies to a Master to have the account taken.

(6) If the action is on a bond with a condition, other than a common money bond, the plaintiff signs interlocutory judgment and then delivers to the defendant a written notice stating which of the conditions he has b oken; the plaintiff then issues a writ of inquiry to get the damages assessed.

(7) In all other cases, he files, in addition to the affidavit mentioned above, his Statement of Claim, and sets the action down for trial.

In this last case, however, the defendant may still, without leave, enter appearance and deliver a defence (O. 21, r. 8).

In all cases where judgment has been signed as above, the defendant may apply for leave to enter appearance, which leave will be given if he shows a good *primâ facie* defence, subject, however, to his paying the costs occasioned by his default, i.e. the costs incurred in signing judgment. The judgment will, of course, be set aside (O. 27, r. 15).

CHAPTER II

PROCEEDINGS AFTER APPEARANCE UP TO DELIVERY OF PLEADINGS

THE steps to be taken by the plaintiff after the defendant has entered appearance depend on whether the writ is indorsed—

1. Specially; or
2. Generally, or for an account.

(1) If the writ is indorsed specially, the plaintiff may adopt one of three courses—

(*a*) He may wait till ten days after the time limited for entering appearance has elapsed, and if no defence has been delivered may sign final judgment in default of defence (O. 21, r. 6); or

(*b*) He may take out a summons under O. 30 asking for directions as to the further progress of the action; or

(*c*) He may, and usually does, take out a summons under O. 14 calling on the defendant to appear before a Master on the hearing of the plaintiff's application for leave to sign judgment on the ground that the defendant has no defence, but has entered appearance only for the sake of delay. The plaintiff supports his application by an affidavit verifying the cause of action, and stating that the plaintiff believes the defendant has no defence. The defendant will try to show by affidavit, documents, or verbal evidence on oath, that he has a good defence. The Master may make one of three orders—

1. He may think the defendant has no defence and give the plaintiff leave to sign final judgment, which, subject to any appeal, will end the action.

2. If he thinks, on the evidence, that the defendant has a good *primâ facie* defence, he may give him unconditional leave to deliver a defence, which defence must, if no time is limited, be delivered within eight days.

3. If he thinks the defence a suspicious one, he may give leave to defend conditionally on the defendant paying money into Court, or giving security.

If claims are included in the indorsement which cannot be specially indorsed, the Master may deal with those properly there, and either strike out the others or give directions as to the trial of them (O. 14, r. 1b).

Whenever leave to defend is given, the Master gives directions as to the further conduct of the action. If the plaintiff knew the defendant had a defence, the costs of the application under O. 14 will be ordered to fall on the plaintiff in any event.

If the Master thinks a prolonged trial will be unnecessary, he may order the action to be put in the SHORT CAUSE LIST, and forthwith set down for trial.

If the parties consent, the Master may try the action himself, but his decision will not be subject to appeal (O. 14. r. 7).

A defendant can always prevent a plaintiff from proceeding under O. 14 by delivering his defence with his notice of appearance (*Raymond* v. *Manders*, unreported, C.A., 19th Jan., 1913; *Annual Practice*, 1921, p. 151).

(2) If the writ is indorsed generally, or for an account, then by O. 30 the plaintiff must, within fourteen days after appearance, take out a SUMMONS FOR DIRECTIONS, requiring the defendant to appear before a Master on the plaintiff's application for certain directions as to the further progress of the action, i.e. that a Statement of Claim and Defence, and, if necessary, a Reply be ordered to be delivered, that discovery and inspection be ordered, that instructions be given as to where, and how the action be tried, i.e. whether with or without a jury.

The Plaintiff must take out this summons in all actions except—

1. Admiralty actions.
2. Those commenced by originating summons.
3. Those commenced by specially indorsed writs.

He must take it out before taking any other step in the action except applying for an injunction or a receiver, or entering judgment in default of defence under O. 27, r. 2. (Order 27, r. 2, applies apparently only where the writ is specially indorsed, since that is the only case where a defendant is bound to deliver a Defence before a summons for directions has been taken out; and where the writ is specially indorsed, as shown above, there is no obligation to take out such summons, so the reference to O. 27 seems rather meaningless.)

If the plaintiff does not take out the summons within the fourteen days, the defendant may apply by summons to have the action dismissed for want of prosecution; the Master may, however, treat this as a summons for directions, making the plaintiff pay the costs.

A defendant may not take out a summons for directions except in the cases where the plaintiff need not (*see* 1–3 above), or where he has served a third party notice and appearance has been entered to it.

If, after the first summons has been disposed of, further directions are required, a fresh application may be made under the original summons by giving two days' notice to the other party; either plaintiff or defendant may apply; but, if the directions might have been obtained on the original hearing, the applicant will be ordered to pay the costs of the new application.

If the writ is indorsed with a claim for AN ACCOUNT, the plaintiff must still take out a summons for directions, but on the hearing of the same the Master will order the account to be taken, unless the defendant can show that there is some preliminary matter to be settled to determine whether the plaintiff is entitled to an account, in which case the Master will give directions as to how the preliminary matter shall be tried.

CHAPTER III

PLEADINGS

THE Pleadings are the documents setting out the facts on which each party is going to rely at the trial.

They consist of the STATEMENT OF CLAIM delivered by the plaintiff; the DEFENCE, which is the answer of the defendant; the REPLY, which is the answer to the defence; subsequent pleadings, which are rarely delivered, are called REJOINDER — SURREJOINDER — REBUTTER — SURREBUTTER.

Generally speaking, pleadings may not be delivered without leave. Order 20, r. 1, prohibits delivery of a Statement of Claim without leave except under Order 13, r. 12. Order 23, r. 1, prohibits delivery of Reply without leave; and by Order 30 the plaintiff must, as a rule, take out a summons for directions within fourteen days after appearance and before taking any other step in the action, with certain exceptions, and then must observe the directions of the Master as to the further progress of the action.

In the following cases, however, pleadings may be delivered without leave—

(1) A Statement of Claim indorsed on a specially indorsed writ (O. 3, r. 6).

(2) A Defence to the above (O. 21, r. 6).

(3) A fresh Defence arising after Defence delivered, and a fresh Reply to a Counterclaim arising after Reply respectively delivered, may be delivered without leave within eight days of it arising (O. 24, r. 3).

(4) Where a party has been brought into an action by way of Counterclaim, he may deliver a Reply to the Counterclaim without leave (O. 21, r. 14).

(5) Where, in default of appearance, it is necessary to file a Statement of Claim, which is generally the case in Chancery, it may be done without leave (O. 13, r. 12).

(6) A Defence to a Statement of Claim filed under O. 13, r. 12, may be delivered without leave.

THE TIME WITHIN WHICH TO DELIVER PLEADINGS

In cases coming under O. 30, the Master will give directions as to the time within which pleadings must be delivered; but if he does not, the STATEMENT OF CLAIM must be delivered within twenty-one days from the date of the order, and the DEFENCE within ten days from delivery of the Statement of Claim.

Where a specially indorsed writ has been served, and no application made by the plaintiff for leave to sign judgment under O. 14, nor for directions under O. 30, the DEFENCE must be delivered within ten days from the time limited for appearance; but if an application has been made under O. 14, and leave to defend given without stating a time for delivery of Defence, it must be delivered within eight days from the order.

Where a Statement of Claim has been filed under O. 13, r. 12, in default of appearance, DEFENCE must be delivered within ten days from the filing.

REPLY must be delivered within the time ordered, or if none mentioned, within ten days after Defence delivered, or in Admiralty within six days of such delivery of Defence.

Every pleading subsequent to Reply must be delivered within the time ordered, or if no time ordered within four days after delivery of the previous pleading (O. 23, r. 3).

The time for delivering pleadings may be extended by subsequent order, or by consent of the parties.

STEPS IN DEFAULT OF PLEADINGS

(1) **In default of Statement of Claim** (O. 27). If the plaintiff does not deliver his Statement of Claim within the time limited, the defendant may apply by summons to a Master to have the action dismissed for want of

prosecution ; but if the pleading is delivered before the hearing of the application, the application will fail, but the applicant will be entitled to his costs (*E. Lyon, Ltd.* v. *W. Sturges & Co.* [1918], 1 K.B. 326). If the application is granted, the action is at an end ; but the plaintiff may commence a fresh one, for there has been no judgment founded on any finding of fact, so there is no estoppel. If the plaintiff applies for an extension of time for delivery of the Statement of Claim, the Court will generally grant it, subject to payment of costs, instead of dismissing the action.

When a Statement of Claim does not give sufficient particulars, the plaintiff may be ordered to give further and better ones. Such particulars form part of the Statement of Claim, and if not delivered within the time ordered, the defendant may apply to have the action dismissed.

(2) **In default of Defence** (O. 27). If the Defence is not delivered within the time limited, the steps to be taken are the same as in default of appearance (*see* p. 41), except that in cases 1 to 6 no affidavit need be filed ; but instead the plaintiff hands in at the Judgment Department of the Central Office a printed form of judgment filled in, the original writ, a copy of the Statement of Claim (if one), and the order (if any) ordering delivery of Defence ; judgment will then be entered, and an office copy thereof handed to the plaintiff. In case 7, the plaintiff merely sets the action down for trial, and at the hearing asks for judgment on the Statement of Claim ; since the facts therein are deemed admitted, no evidence is required (O. 27, r. 9), unless the defendant is under a disability, when the facts must be proved by affidavit (*Cheek* v. *Cheek*, 1876, 45 L.J.N.C. 222).

In all cases of default of Defence to a Counterclaim, the defendant must apply by motion for judgment under O. 32, r. 6, or set the action down for trial under O. 27, r. 11 ; he cannot sign judgment in default of Defence.

In all cases, the party against whom judgment has been so obtained may apply to have the judgment set aside on proving by affidavit a good defence and subject to payment of costs (O. 27, r. 15).

(3) **In default of Reply or subsequent Pleadings.** With the exception of a Defence to a counterclaim, which is treated as an ordinary Defence though forming part of the Reply, default in delivery of any pleading subsequent to Defence amounts to a joinder of issue, i.e. a denial of all facts in the preceding pleading, and the next step is to enter the case for trial.

AMENDMENT OF PLEADINGS

Pleadings, when delivered, may often be amended and redelivered as so amended.

Leave to amend must be obtained from a Master except in the following cases—

(1) **A Statement of Claim,** including the indorsement on a specially indorsed writ, may be amended without leave once as follows, by O. 28, r. 2—

(*a*) If a Defence has been delivered, and a Reply ordered, the amendment must be within the time limited for Reply, and before replying; if no Reply has been ordered then within ten days of delivery of the last of the Defences.

(*b*) If no Defence has been delivered, an amendment must be within four weeks from the last appearance.

(2) **A Set-off or Counterclaim** may be amended without leave apparently any number of times, as follows, by O. 28, r. 3—

(*a*) If a Reply has been delivered, before the expiration of the time limited for answering it and before answering.

(*b*) If no Reply has been delivered, within twenty-eight days after delivery of Defence.

(3) **An Amended Pleading** must be answered within the time within which the party on whom it is served has to plead, as where he has not yet delivered a pleading, or

within eight days from delivery of the amendment, whichever is the longer period. If the other party has already delivered a pleading, he may deliver an amended one without leave in answer within the above time. If a party does not plead to an amended pleading, he will be deemed to rely on his former pleading (O. 28, r. 5).

(4) **Where some Defence arises after Defence delivered,** the defendant may, without leave, deliver a fresh defence, embodying it within eight days of its having arisen. If this new Defence is not replied to, then all material statements of fact therein will be deemed denied and issue will be deemed joined on it (O. 24, r. 3).

In no other cases may a writ or pleading be amended without leave.

PLEADINGS EXTENDING THE CLAIM ON THE WRIT

A Statement of Claim may, if it is going to be delivered and not merely filed in default of appearance, alter, modify, or extend the claim on the writ without necessitating amendment of the writ. So the writ may ask for damages and the statement of claim for an injunction (O. 20, r. 4).

The only limit on this rule is that no new cause of action may be thereby introduced (*Cave* v. *Crewe*, 1882, 62 L.J., Ch. 530).

RULES FOR DRAWING PLEADINGS

There are certain rules common to all pleadings, while others are more particularly applicable to Statements of Claim, and Defences by way of confession and avoidance (*see* p. 54), and other rules are more applicable to Defences by way of traverse.

The rules applicable to all pleadings are as follows—

(1) They are, when necessary, to be divided into paragraphs, numbered consecutively.

(2) Dates, sums, and numbers are to be expressed in figures, not words.

(3) If they exceed ten folios, they must be printed.

(4) They must be signed by the counsel, solicitor, or litigant who actually settled them.

(5) The exact words of a document need not be set out; it is sufficient to set out the effect unless the words are material, as in libel (O. 19, r. 21). So the terms of a notice need not be set out (O. 19, r. 23), nor the terms of an account; and where a contract is contained in a correspondence it is sufficient to refer generally to the letters (O. 19, r. 24).

(6) No matters which the law presumes in a party's favour need be alleged by him. So as the law presumes that a holder of a bill of exchange is a holder in due course, this need not be alleged.

(7) Particulars of a debt, expenses, or damages, must be set out in a pleading, and if they exceed three folios they must be delivered as a separate document, unless they have been already delivered; but in each case they must be referred to as exceeding three folios and as having been delivered with or before the pleading, as the case may be (O. 19, r. 6).

(8) A pleading must be marked on the face of it with the date of the day on which it is delivered, the reference letter and number of the action, the Division, and the Judge, if any, to which the action is assigned, the title of the action, and the description of the pleading.

(9) Indorsed on the pleading must be the name and the business address of the solicitor delivering it, or, if none, the name and address of the litigant delivering it.

RULES SPECIALLY APPLICABLE TO STATEMENTS OF CLAIM AND TO DEFENCES IN CONFESSION AND AVOIDANCE

(1) Facts must be alleged, not law. So the plaintiff must not merely allege that the defendant owes him money, he must set out the facts which show that in law the money is due.

(2) Facts only must be alleged, not the evidence by which they are to be proved. So in an action for goods sold and delivered, the plaintiff should allege that the goods were delivered to and accepted by the defendant, not that he handed them to his servant for delivery to the defendant and that the servant delivered them, and the defendant said he would accept them, for this is evidence.

It is difficult sometimes to determine whether facts are not also evidence; in such cases the facts should be pleaded.

(3) Only material facts must be alleged. A useful form to adopt is "at all times material to this action the plaintiff was a ——."

As only material facts must be pleaded, if defendant's dog has bitten plaintiff's horse it should not be alleged that the defendant knew the dog was savage, for there is no need to prove this in such a case (Dogs Act, 1906).

In claims where the damages depend on the plaintiff's position in life, such position should be set out, e.g. in libel and personal injury.

(4) The plaintiff need not allege the performance of a condition precedent; it is for the defendant to set up that the condition exists and has not been performed; so, although a lessor, as a rule, may not eject a tenant for breach of covenant until he has served him with notice of such breach, in an action for recovery of possession for such breach, he need not allege service of such notice (*Gates* v. *Jacobs, Ltd.*, 123 L.T.R. 238).

The only exception to this rule is that in case of actions against the drawer or indorsers of bills of exchange, or the indorsers of cheques and promissory notes, it must be alleged that the instruments were duly presented for payment, dishonoured, and notice of dishonour duly given (*Roberts* v. *Plant*, 1895, 1 Q.B. 597).

(5) In actions in which the plaintiff claims to be the owner of property,

(*a*) If the plaintiff was in possession at the date of the wrong complained of, in the case of goods it is enough to allege that the goods were the plaintiff's; and in actions relating to land it is sufficient if the plaintiff is entitled in fee simple to allege that the plaintiff was at all times material to this action seised in fee simple in possession; but if he is entitled otherwise, the facts constituting his title must be set out, e.g. "The plaintiff at all times material to this action was entitled in possession to an estate for life in..... under an Indenture dated..... and made between X and Y."

(*b*) If the plaintiff was not in possession at the date of the wrong, then he must set out the title of the party who was in possession as in case (*a*), and then the facts showing how the title devolved on himself, e.g. A dies leaving B his heir, but C is in possession, having entered either before or after A's death but before B had taken possession; B must set out in his Statement of Claim

"1. That on a certain day one A died intestate, entitled in possession in fee simple (or whatever his estate was as in case (*a*)), leaving the plaintiff his only son and heir at law.

"2. That on a certain day the defendant wrongfully entered on the said land and is still in possession."

N.B.—In no case need the title be set out if the defendant is estopped from denying it, e.g. as being the tenant of the plaintiff, or of the plaintiff's predecessor in title, though, of course, the lease must be pleaded, and in case the plaintiff was not the lessor, the devolution of title also.

(6) In all cases the plaintiff must state what relief he claims, and may ask for alternative relief on alternative sets of facts which may be inconsistent with each other (*Annual Practice*, 1921, p. 360).

The different kinds of relief obtainable in the King's Bench are, *inter alia*, damages, injunction, restitution of

property, specific performance of contracts other than those relating to land, account, interpleader, declaration of title or right, the last named applying where it is desired to get the judgment of the Court as to the rights of the parties, although it is not alleged that there has been any infringement of the same (O. 25, r. 5).

In Chancery, in addition to the above, relief in respect of the matters assigned to Chancery can be obtained (see p. 9).

RULES FOR DRAFTING DEFENCES

Defences fall under one of three classes.

(1) **A Traverse,** or a denial of the facts alleged in the Statement of Claim.

Facts not traversed expressly or impliedly will be deemed admitted except

(*a*) as against an infant, lunatic, or person of unsound mind not so found (O. 19, r. 13).

(*b*) In respect of damages, as a defendant need not plead to damages nor to their amount, for they are always deemed in issue (O. 21, r. 4).

If a fact has been traversed once, it need not be traversed again.

(2) **A Plea in Confession and Avoidance,** i.e. an allegation that even if the facts alleged in the Statement of Claim are true, there are other facts affording a Defence.

(3) **An Objection in Point of Law,** i.e. an allegation that even if the facts set out in the Statement of Claim are true, they give the plaintiff no legal right to the relief claimed.

We will deal with each of these in turn, merely premising that it is open to the defendant to plead all three of them, even though they are inconsistent with one another (Thesiger, J., in *Berdan* v. *Greenwood,* 1878, 3 Ex.D. 255).

(1) **A Traverse.** In traversing, the following rules must be observed—

(*a*) The defendant must deny specifically each allegation of fact in the Statement of Claim that he does not

wish to admit, as otherwise (unless he is an infant, a lunatic, or a person of unsound mind not so found, O. 19, r. 13), he will be deemed to admit them. But he need not deny allegations of law, though he may raise such a point by an objection in point of law.

It is not a good traverse to allege that he is not liable, i.e. to plead the general issue; he must state which of the facts alleged to constitute his liability in law he denies.

So long as the traverse will not be evasive, the following form will suffice: "The defendant denies the facts alleged in par. 1 of the statement of claim" (*Grocott* v. *Lovatt & anor.* [1916], W.N. 317; 61 Sol. J. 28, C.A.).

But the paragraph should be referred to (*Burdett* v. *Humphage*, 1892, 92 L.T.J. 294).

The defendant may say "he does not admit" instead of denying.

The rule requiring specific denial is subject to one exception, namely, a traverse of "not guilty by Statute" may be pleaded. This puts the onus of proof on the plaintiff, who sues under a Statute to prove that the Statute has been infringed. For example, if the plaintiff sues under 24 & 25 Vic. c. 96, Sec. 102, to recover £50 from a person who has advertised offering a reward for the return of stolen goods, and stating that no questions will be asked, the defendant may put in this plea, but no other plea may be pleaded with it without leave.

(*b*) The defendant must not deny evasively, i.e. must not be guilty of a negative pregnant, or one which may carry with it an implied affirmative, as it is ambiguous how much is denied. He must show precisely how much is denied

So if the plaintiff alleges that he lent the defendant £500, the defendant, if any sum was lent, must state how much, or if none was lent must deny that £500 or any sum was lent to him. If the plaintiff alleges that the defendant

wrongfully broke into his house, the defendant should deny that he broke into the said house wrongfully or at all, and should also deny, if that is a part of his Defence, that the house was the plaintiff's at the date of the wrong complained of.

So if the plaintiff alleges that the defendant did two things, the defendant must deny that he did either of them, as a denial that he did both might mean that he did one of them but not the other.

(*c*) In actions for the recovery of land, the defendant, if in possession by himself or his tenant, need not plead his title unless it is equitable, as where he has agreed to buy the land, but it has not yet been conveyed to him though he has taken possession (O. 21, r. 21). It is enough in other cases to plead possession, and such plea will entitle the defendant to raise a defence, even of Statutes of Limitation (*Annual Practice*, 1921, p. 370). In an action for the recovery of land, the plaintiff must succeed by the strength of his own title, not by the weakness of the defendant's.

(2) **Pleas in Confession and Avoidance.** Under this class of Defence, we get the following: Set-off, counter-claim, fraud, infancy, and other disabilities; non-performance of a condition precedent, leave and licence, Statute of Frauds, Gaming Act, Statutes of Limitation, privileges in defamation, matters in mitigation of damages.

In pleading the new facts, the same rules must be observed as in drawing a Statement of Claim, with the following exceptions—

(*a*) The particular section of the Statute of Frauds or the Statute of Limitation need not be set out.

(*b*) In actions for the recovery of land, the Statutes of Limitation need not be pleaded, as this defence may be pleaded under a defence of possession (*Annual Practice*, 1921, p. 370).

(*c*) It is necessary to plead illegality by way of confession and avoidance, unless it appears on the face

of the Statement of Claim (*North-Western Salt Co.* v. *Electrolytic Alkali Co.* [1914], A.C. 461).

Matters in mitigation of damages, e.g. the bad character of the plaintiff, may be pleaded or not, as the party pleases, though by O. 36, r. 37, in cases of defamation, if the defendant does not plead truth as a Defence, he may not give evidence of the plaintiff's bad character unless he has given him seven days' previous notice with particulars, or gets leave of the Judge.

NOTES ON SET-OFF AND COUNTERCLAIM

A SET-OFF or COUNTERCLAIM, as the case may be, arises where the defendant has some cross claim against the plaintiff, or, as regards Counterclaim, even as against the plaintiff and a third party jointly, which he desires adjudicated on at the same time as the plaintiff's claim.

SET-OFF was first provided for by 2 Geo. II. c. 22, and 8 Geo. II. c. 24, repealed by Statutes of 1879 and 1883 with a saving for the rules and principles established under the repealed Statutes. COUNTERCLAIM is provided for by the Judicature Act, 1873, Sec. 24 (3).

Formerly an equitable cross claim could not be pleaded to a Common Law claim, but now it may and *vice versâ* (*Fleming* v. *Loe*, 1901, 2 Ch. 594).

As regards both Set-off and Counterclaim, the plaintiff's claim and the defendant's cross-claim must be due to and from each other in the same right, so that a claim by a party personally cannot be set off against a claim made against him in a representative capacity.

To this rule there is one exception: a debt due from a *cestui que trust* may be set off, though not counterclaimed for, against a debt sued for by a trustee of the *cestui que trust* for the benefit of the *cestui que trust* (*Bankes* v. *Jarvis*, 1903, 1 K.B. 549).

The following distinctions exist between Set-off and Counterclaim—

A SET-OFF must be a liquidated cross-claim, it must be

due at the date of the issue of the writ (*Richards* v. *Janes*, 1867, 2 Ex. 471), it can only be pleaded in answer to a liquidated claim, it can only be made in respect of a debt due from the plaintiff, the defendant cannot recover judgment for anything on it, nor can he get costs on the amount recovered on it unless the amount equals the amount recovered by the plaintiff on the claim, in which case the defendant will recover the costs of the action. Finally, if the plaintiff discontinues, the defendant cannot go on with the Set-off.

A COUNTERCLAIM may be any cross-claim: it need not be connected with the claim, unless it is a counterclaim against the plaintiff and a third party (see *ante*, p. 26); the facts on which it is founded may have arisen after the action was commenced (the Counterclaim must then state "the Counterclaim arose after the commencement of the action"); it may be pleaded in answer to any kind of claim, liquidated or unliquidated; it may be made in respect of a debt due from the plaintiff and another jointly; a defendant is entitled to judgment for anything he recovers on a Counterclaim, and such judgment carries costs. So if the plaintiff succeeds on the Claim and the defendant on the Counterclaim, the plaintiff will have judgment on the Claim with costs of the action, and the defendant will have judgment on the Counterclaim with the costs of the Counterclaim; the two sets of costs are generally ordered to be set off against each other (*Atlas Metal Co.* v. *Miller*, 1898, 2 Q.B. 500; *Provincial Bill Posting Co.* v. *Low Moor Iron Co.*, 1909, 2 K.B. 344).

In two cases, however, a defendant can recover nothing on a Counterclaim—

(*a*) A Counterclaim by a debtor against the assignor of the debt in a claim by the assignee, though it is good as a defence up to the amount of the debt, does not entitle the defendant to any judgment thereon (*Young* v. *Kitchen*, 1878, 3 Ex.D. 127), though, of course, if he recovers

enough in respect of it to defeat the Claim, he gets the costs of the action.

(*b*) On a Counterclaim against a foreign Sovereign or State, nothing can be recovered, though it is good as a set-off up to the amount of the claim (*South African Republic* v. *La Compagnie Franco-Belge Du Chemin De Fer Du Nord*, 1897, 2 Ch. 487).

Finally, if the plaintiff discontinues, the defendant may still proceed with the Counterclaim, and set the action down for trial so as to have the Counterclaim adjudicated on (O. 21, r. 16).

A SET-OFF is a shield not a sword (Cockburn, C.J., in *Stooke* v. *Taylor*, 1880, 5 Q.B.D. 575), a COUNTERCLAIM is an independent action except in the following respects—

(i) The defendant may not sign judgment in default of defence to it, but must move for judgment (O. 27, r. 11 ; O. 32, r. 6).

(ii) A Counterclaim cannot be made the subject of a proceeding under O. 14.

(iii) A Counterclaim cannot be remitted to the County Court from the High Court, unless only the Counterclaim remains to be disposed of (*see* p. 2).

N.B.—In all cases, a Master may, on the plaintiff's application before trial, order a Counterclaim or Set-off to be struck out if he thinks it would be inconvenient to try it together with the claim (O. 19, r. 3). If a Counterclaim is made against the plaintiff jointly with another, the plaintiff or such other may apply to have it struck out on the above ground, but the application must be made before Reply (O. 21, r. 15).

(3) **Objection in Point of Law.** This amounts to a defence that the facts set out in the Statement of Claim do not in law give rise to any cause of action.

It is not compulsory to plead this defence, as the plaintiff at the trial must prove that he has a cause of action (*Stokes* v. *Grant*, 1877, 4 C.D. 28) ; but if this defence is pleaded, then O. 25, r. 2 applies, which

provides that by consent of the parties, or by order of the Court or a Judge on the application of either party, the point may be set down for hearing and disposed of at any time before the trial. If the decision of the point substantially disposes of the whole action, or of any distinct cause of action therein, the Court or a Judge may dismiss the action, or make such order therein as may be just.

By way of objection in point of law, a plea may sometimes be put in to damages, e.g. if special damage is essential, then if it is alleged in the Statement of Claim, it may be objected that the special damage alleged is not sufficient in point of law to sustain the action ; if it is not alleged, it may be pleaded that " the matter disclosed in the Statement of Claim is not actionable without proof of special damage, and that no special damage is alleged " (R.S.C. App., E., Sec. 111, No. 2).

REPLY

Except in Admiralty actions and in the cases mentioned on page 46, leave to deliver a Reply is necessary (O. 30).

Where a Reply would merely deny the facts set out in the Defence and there is no Counterclaim, leave will not be given, since by not delivering a Reply such denial is implied, i.e. there is a " joinder of issue."

If, however, it is desired to admit all or some of the facts in the Defence, or to allege new facts in answer to the Defence, or to raise a point of law, or if there is a Counterclaim and it is desired to traverse it, leave to deliver a Reply will be given, since the new facts must be alleged to enable the plaintiff to give them in evidence, and as regards the Counterclaim, it is treated as a Statement of Claim, and allegations of fact therein not denied are deemed admitted, so the Reply to it is treated as a Defence. There seems no authority as to whether a Set-off need be traversed. Again, if the defendant sets up Statutes of Limitation and the plaintiff desires to rely

on part-payment, or payment of interest, or an acknowledgment, or disability, or absence of the defendant beyond the seas, he must deliver a Reply alleging these matters.

Similarly, by O. 19, r. 15, the plaintiff (and defendant) must raise by his pleadings all such grounds of reply as if not raised would take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleading, e.g. fraud, Statutes of Limitation, release, payment, performance, facts showing illegality either by Common Law or Statute, and a defence of Statute of Frauds.

A Reply must in no case contain a DEPARTURE in pleading, i.e. an allegation of fact inconsistent with the previous pleading of the party (O. 19, r. 16); this can only be done by amending the previous pleading. So if a party claims land as heir of a devisee, and the defence alleges that the devise was invalid, the reply may not put forward a claim as heir of the testator; such claim must be made by amending the statement of claim (*Duckworth* v. *McClelland*, 1878, 2 L.R. Ir. 527).

NEW ASSIGNING, however, is apparently not a departure, but merely points out the nature of the plaintiff's original claim. (See *Pratt* v. *Groome*, 1812, 15 East, 235, where the plaintiff sued for trespass, and defendant pleaded a right of way, and the plaintiff was allowed to new assign that his claim was that the defendant wandered from the right of way.) As the matter is not free from doubt, it might be wiser to amend instead of new assigning.

REJOINDER, SURREJOINDER, REBUTTER, SURREBUTTER, ETC.

No pleading subsequent to a Reply may be delivered without leave, nor will one be necessary unless it is desired to allege new facts in answer to a reply and defence to Counterclaim, for non-delivery amounts to a joinder of issue, i.e. a denial of all facts in the preceding pleading.

DEMURRER

Formerly an objection in point of law, whether in defence or reply or other pleading, was dealt with by a special proceeding called DEMURRER, but now DEMURRERS are abolished (O. 25, r. 1), and points of law may be dealt with in the ways pointed out before (*see* p. 59).

CHAPTER IV

INTERLOCUTORY PROCEEDINGS

BETWEEN the issue of the writ and the trial of the action, many applications may be and are made by each party, and are called Interlocutory applications; some of them have already been dealt with, e.g. application for substituted service, for service out of the jurisdiction, for directions, interpleader, for leave to sign judgment under O. 14, for a third party notice. It is now proposed to treat of those which have not been already dealt with, merely premising that in the King's Bench most of them are made to a Master (unless otherwise stated) and by summons.

(I) **PAYMENT INTO COURT.**—The defendant may pay into Court, **without leave, with or before defence,** otherwise leave is required (O. 22, r. 1).

Payment in amounts to an admission of liability unless liability is denied; so if it is desired to deny liability, payment in must not be made before defence. If it is made with or before defence, it must be pleaded in the defence, and if made before defence, notice thereof must be given to the plaintiff (O. 22, r. 4).

If payment in is made with a plea of tender, liability must be admitted (*Annual Practice*, 1921, p. 372).

In defamation, with one exception, if the defendant pays in, he must admit liability (O. 22, r. 1); and if one of two joint defendants in such case pays in, the other cannot deny liability (*Beaumont* v. *Kaye & wife*, 1904, 1 K.B. 292).

The exception referred to above is provided by Lord Campbell's Libel Act, 1843, whereby in the case of a libel published in a newspaper or other periodical publication, the defendant may plead the following defence, i.e. that he has paid in sufficient, apologized, and not been guilty

of any malice or gross negligence. On proving all these matters, he is entitled to judgment; but if he fails to prove any one of them, the plaintiff is entitled to judgment, even though he recovers no more than the amount paid in, for the defendant having elected to plead under the Act, cannot claim to have the payment in treated as having been made under O. 22, in which case he would be entitled to judgment if the plaintiff recovered no more than the amount paid in (*Oxley* v. *Wilks*, 1898, 2 Q.B. 56).

That payment in under the Act amounts to a denial of liability is shown by the fact that if the plaintiff takes the money out he cannot go on with the action (*Harris* v. *Arnott*, 1889, 24 L.R. Ir. 404).

In certain cases, payment in is compulsory, namely—

(1) If it is desired to plead a defence under Lord Campbell's Libel Act, 1843. (*See* above.)

(2) If it is desired to plead tender as a defence (O. 22, r. 3).

(3) If leave to defend has been given under Order 14 conditionally on payment in.

(4) If it is desired to plead limitation of liability under Section 503 of the Merchant Shipping Act, 1894.

Where money is paid in, the plaintiff may, without leave, unless it is paid in by order of Court otherwise than under O. 14, take it out whether liability is admitted (r. 5) or denied (r. 6), but must do so, if payment in is made before Defence delivered, within seven days after notice of payment in, or if payment in is first notified in the defence, then before reply, or if no reply is ordered within ten days of delivery of the last of the Defences (r. 7).

If payment in is made with a denial of liability, the plaintiff, if he takes the money out, must give notice to the defendant and cannot go on with the action (r. 6a).

If payment in is made with an admission of liability, i.e. before defence, or with a defence which does not deny liability, then the plaintiff may take the money out in satisfaction, give notice to the defendant and, except

where tender is pleaded, tax his costs (r. 7); if tender is pleaded, the action must go on to determine the validity of the tender, and if tender is proved, the defendant is entitled to his costs (*Griffiths* v. *Ystradyfodwg School Board*, 1890, L.R. 24 Q.B.D. 307); but if the plaintiff desires to continue the action so as to recover more, he may do so (*Annual Practice*, 1921, p. 384), but if he does not recover more than the amount paid in, he will not be entitled to the costs of the action incurred after payment in.

If one of two defendants sued on a joint liability pays in, and the plaintiff accepts the sum paid in, he must give notice to the other defendant, and thereupon all proceedings, except as to costs, shall be stayed (r. 8a). There appears nothing in this rule to limit it to cases where liability is denied, though the rule formerly only applied to such cases (*Beadon* v. *Capital Syndicate*, 1912, 28 T.L.R. 394).

Infants and persons of unsound mind not so found cannot, without leave of the Court or a Judge, accept money paid into Court (r. 15).

If the Plaintiff Leaves the Money in Court, then if the liability was denied, and even if he recovers enough to carry costs but not more than the amount paid in, he is not entitled to the costs in respect of the issue of liability unless the Judge is satisfied that there was reasonable ground for not accepting the sum paid in (r. 6); but he is entitled to the costs incurred up to the date of payment in; but if liability was admitted and the plaintiff recovers no more than the amount paid in, he is never entitled to more than the costs incurred up to the date of payment in, the defendant being entitled to the other costs.

In any case where the plaintiff recovers less than the amount paid in, the balance will be ordered to be paid to the defendant subject to any set-off for costs (r. 6c).

In all cases where an action is tried by a Judge and jury, the jury are not to be informed that money has been paid into Court (r. 22). It is questionable whether this rule

applies to payment in under Lord Campbell's Libel Act, 1843 (*Annual Practice*, 1921, p. 403).

(II) **DISCOVERY.**—Discovery is directed to ascertaining either what facts an opponent is prepared to swear to, or what documents he has in his possession relating to the cause. The first kind is discovery of facts; the second of documents.

(*a*) **Discovery of Facts.** This is obtained by obtaining leave from a Master to deliver to the other side written questions called INTERROGATORIES, which he is required to answer on oath.

Interrogatories will not, as a rule, be ordered till after defence delivered.

Application for leave to deliver them is made under the summons for directions by serving a two-days' notice on the other party, together with a copy of the proposed Interrogatories; such party may then appear and oppose the application.

The Master should refuse to allow Interrogatories on the following grounds under O. 31, r. 7—

(1) That they are exhibited unreasonably or vexatiously.

(2) That they are scandalous, i.e. going to a party's credit and not being otherwise relevant (*Fisher* v. *Owen*, 1878, 8 C.D. 653).

(3) That they are oppressive, i.e. where the matter sought to be obtained would only be of use if the plaintiff won the action (Jessell M.R. in *Parker* v. *Wells*, 188., 18 C.D. 438).

(4) That they are unnecessary, i.e. irrelevant. So a defendant in possession in an action for recovery of land need not answer Interrogatories as to his title, for the relevant point is the plaintiff's title and not the defendant's (*Miller* v. *Kirwain*, 1903, 2 Ir. 118).

In *Sebright* v. *Hanbury* (115 L.T.R. 75) an interrogatory asking whether the defendant, who had contracted as principal, was not an agent of an undisclosed principal,

and who such principal was, was disallowed, since the only result of an answer in the affirmative would be to enable the plaintiff to release the defendant, and therefore it was not relevant to the plaintiff's claim against the defendant.

(5) That they are prolix, i.e. too lengthy.

(6) That they are fishing, i.e. where the plaintiff endeavours to find out a case against the defendant different from that alleged in the Statement of Claim; so in slander an Interrogatory as to whether the defendant uttered the words set out in the Statement of Claim or other, and what words to the same effect on the same occasion, would be allowed (*Dalgleish* v. *Lowther*, 1899, 2 Q.B. 590), but not if it refers to another occasion (*Pankhurst* v. *Hamilton*, 1886, 2 L.T.R. 682).

In *Griebart* v. *Morris* (122 L.T.R. 736), the plaintiff, in a-running down action, having no witnesses and a hazy recollection of the accident, was allowed to interrogate the defendant as to the position of the vehicle and how far it was from the plaintiff and from the curb, the Court the holding it was necessary in order to dispose fairly of action.

(7) That the action is a penal one (*Hobbes & Co.* v. *Hudson*, 1891, 63 L.T. 215).

(8) That the action is for the recovery of land under a forfeiture clause. In such case no interrogatory directed to ascertaining the facts proving ground for forfeiture will be allowed (*Earl of Mexborough* v. *Whitwood Urban District Council*, 1897, 2 Q.B. 111).

These objections may be urged before the Master on the original application, or may be made the ground of an application to set aside or strike out the Interrogatories within seven days after delivery of the same (O. 31, r. 7). An objection to answer an Interrogatory on any of the above grounds may also be taken in the affidavit in answer (O. 31, r. 6; and *Peek* v. *Ray*, 1894, 3 Ch. 282).

Certain other objections must be taken in the affidavit in answer, as they are not grounds for disallowing, or

setting aside, or striking out an Interrogatory. They are as follows: That the answer—

(*a*) Would be injurious to the State.

(*b*) Would be a breach of legal professional privilege.

(*c*) Would disclose communications between husband and wife.

(*d*) Would incriminate the party answering, or subject him to liability to a penal proceeding.

(*e*) Relates to the contents of a document, unless the original is admitted to be lost. If in existence, the document is the best evidence of its own contents.

(*f*) Would disclose evidence or the names of witnesses; but if an Interrogatory is otherwise relevant, the fact that answering it would disclose the names of witnesses is no objection (*Marriot* v. *Chamberlain*, 1886, 17 Q.B.D. 154).

In case of Interrogatories proposed to be delivered to a corporate body, the applicant must name a member thereof whom he asks to be allowed to interrogate, and who must be served with notice of the application (O. 31, r. 5).

In deciding whether to allow Interrogatories, the Master shall take into account any offer made by the party sought to be interrogated to deliver particulars, make admissions, or produce documents relating to the matter in question (r. 2).

(*b*) **Discovery of Documents.** This is obtained by applying to a Master under the summons for directions for an order that the other party may set out on affidavit what documents he has, or has had, in his power or possession relating to the cause of action (O. 31, r. 12).

No affidavit is necessary on this application, and it may be made on the first summons for directions; but the order will not require such discovery to be made until after defence has been delivered.

The affidavit consists of two schedules and a concluding clause.

Schedule 1 has two parts: Part 1 sets out the documents which the party has and is willing to produce; Part 2, those he has but will not produce, stating why.

Schedule 2 sets out those he had but no longer has, and also when he last had them, and what has become of them.

The concluding clause states that the party has not, nor ever has had, any documents relating to the case other than those referred to in the schedules.

If a party's affidavit has the concluding clause referred to above, he cannot be required to make another general affidavit unless, owing to his having misconceived the nature of his case or for any other reason, it is clear that he cannot have made a complete one (*British Association of Glass Bottle Manufacturers, Ltd.* v. *Nettlefold* 1912, A.C. 709). In all other cases, if a party thinks that his opponent has not disclosed all his documents he may make a further application to a Master for an order for FURTHER AND BETTER DISCOVERY, calling on his opponent to state on oath whether he has or ever has had certain specified documents in his possession. This application must be supported by an affidavit of the applicant specifying the documents and stating the applicant's belief that his opponent has them or has had them.

The original application for discovery need not be supported by an affidavit.

A party is entitled to see and to be supplied with copies of the documents set out in Part I of Schedule 1 and also of all other documents referred to in the pleadings, unless there is some legal excuse for their non-production.

To get such production he serves on the other party a notice to produce them for his inspection.

The grounds on which a party may refuse production are the following—

(1) That disclosure would subject the party to the risk of a criminal prosecution, or a penal proceeding.

(2) That the documents are the subject of private privilege, e.g. communications between solicitor and

client in professional relations, or communications between husband and wife.

(3) That they were prepared for the case. Under this would come opinions of counsel, instructions to counsel, proofs of witnesses, information obtained with a view to determining whether to commence proceedings.

(4) That disclosure of the documents would be a breach of a duty to another, e.g. when the document relates to information obtained for a master by his servant (*Eccles* v. *Louisville & Nashville Ry.*, 1912, 1 K.B. 135).

(5) Documents relating solely to a party's title to land.

(6) Documents showing that party has forfeited his interest in land (*Earl of Mexborough* v. *Whitwood Urban District Council*, 1897, 2 Q.B. 111).

(7) Documents relating solely to the party's own case.

(8) Documents which are the property of another.

(9) State documents.

The Master may see any document for which privilege from production is claimed, and determine whether it should be produced.

Discovery can be obtained by one defendant against another only if there is some right to be adjusted between them, e.g. where one has served the other with a third party notice. So in *Birchell* v. *Birch, Crisp & Co.*, 1913, 109 L.T. 275, where B sued X and Y, claiming to be entitled under a charge to a commission payable by X to Y, and X's defence was that he had a right to set off damages for misrepresentation by Y, it was held that as X did not, and indeed could not, counterclaim against Y, he could not get discovery against Y.

Procedure where Default is made in Discovery. If a party wrongfully refuses to answer interrogatories, or to make an affidavit of documents, he may be committed for contempt, and if he is plaintiff, his action may be dismissed, and if defendant, his Defence struck out, and the plaintiff may then sign judgment in default of Defence.

If a party wrongfully refuses to produce documents for inspection, application should be made for an order for production, and a refusal to comply with such order renders the party incapable of using the documents at the trial and liable to attachment for contempt, and to be dealt with as above stated (O. 31, r. 14).

It is worthy of note that, although a party may refuse to answer interrogatories on the grounds stated above, he could not refuse to answer such questions in the witness box except on the ground of public or private privilege, or that the answers are incriminating or penal, nor can he refuse to produce documents at the trial except on such grounds.

(III) **APPLICATION FOR PARTICULARS.**—When a pleading does not set out all the detail that it ought to, the other side may apply by summons that further and better Particulars of any particular paragraph be given. Such Particulars form part of the pleadings, and their binding force is that the party giving them may not prove other matters at the trial; so if, in the case of a collision between the plaintiff's and defendant's cars, Particulars of negligence allege only that the defendant's driver was drunk, evidence could not be given that he was driving on the wrong side of the road.

Particulars need not be given of a traverse, even if it is a traverse of a negative, if the onus of proof is on the plaintiff. See *Weinberger* v. *Juglis* (118 L.T.R. 208).

On a refusal to obey an order for delivery of Particulars, application should be made to have the action dismissed if the plaintiff is in default, or to have the Defence struck out if the defendant is in default.

Unlike answers to Interrogatories, Particulars are not on oath and are not evidence, whereas answers to interrogatories are evidence if put in.

The object of Particulars is to ascertain the facts on which your opponent is going to rely; the object of

Interrogatories is to obtain evidence to support your own case.

(IV) **TRANSFER TO THE COUNTY COURT.**—For the cases in which this may be ordered, see *ante* (p. 2). Such transfer may be made, even though the plaintiff has been allowed to sue in the High Court as a "poor person" (*Perry* v. *London General Omnibus Co.*, 115 L.T.R. 101).

In all such cases, costs begin to run on the County Court scale from the date when the order remitting the case is lodged in the County Court (*D'Errico* v. *Samuel*, 1896, 1 Q.B. 163).

(V) **TRANSFER TO THE COMMERCIAL LIST.**—At any stage of the proceedings, even before entering appearance, either party may apply to the Commercial Judge to transfer the case to the Commercial List.

The advantage of such transfer is that all interlocutory applications are made to such Judge, who may order points of claim and defence instead of pleadings, and lists of documents instead of discovery. The Judge can also provide for the speedy trial of the action.

Commercial cases which may be so dealt with are those relating to the construction of mercantile documents, affreightment, insurance banking, mercantile agency, and mercantile usage.

(VI) **APPLICATION TO DISMISS THE ACTION FOR WANT OF PROSECUTION.**—This application may be made to a Master by the defendant if the plaintiff omits—

(*a*) To take out a summons for directions within fourteen days after appearance in cases where it ought to be taken out.

(*b*) To deliver a Statement of Claim within the time limited for such delivery.

(*c*) To make discovery of facts or documents when ordered.

(*d*) To give notice of trial within six weeks after the close of the pleadings.

(*e*) To deliver particulars when ordered (*Davey* v. *Bentinck*, 1893, 1 Q.B. 185).

(VII) **APPLICATION TO STAY PROCEEDINGS AND SEND THE MATTER TO ARBITRATION.**—Where parties have agreed IN WRITING to refer disputes to arbitration, then if one of them commences an action, the defendant may, after appearance and before taking any other step in the action, apply to have the action stayed and the matter sent to arbitration. The application is by summons to a Master (Arbitration Act, 1889, Sec. 4).

The application will be refused if the plaintiff contends that the contract containing the arbitration clause is void or voidable, and claims to have it set aside (*Monro* v. *Bognor U.D.C.* [1915], 3 K.B. 167) ; also if there is a difficult point of law involved (*re Carlisle*, 44 C.D. 200) ; also if the defendant has repudiated the contract, as where a friendly society had expelled a member, who thereupon sued for reinstatement (*Palliser* v. *Dale* [1897], 1 Q.B. 25) ; also if there is no dispute, as where a friendly society had admitted their liability to the plaintiff, but asked for time in which to pay (*Vicars* v. *Great Horwood Friendly Society*, 51 Q.B. 596).

(VIII) **APPLICATION TO STRIKE OUT A PLEADING OR A PART THEREOF.**—Either party may apply to have any pleading, or a part of a pleading, struck out on the ground that it discloses no reasonable cause of action or defence, as the case may be (O. 25, r. 4) ; but if the defect can be cured by amendment, leave to amend will be given instead of striking the pleading out.

Any portion of a pleading which is scandalous may be struck out (O. 19, r. 27) ; but nothing which is relevant can be scandalous. A scandalous allegation would be one which attacked the opponent's character on a matter irrelevant to the case, merely going to his credit in case he gave evidence.

(IX) **APPLICATION FOR SECURITY FOR COSTS.**—In the following cases, a plaintiff, or a defendant who has

counterclaimed, may be ordered by a Master, on his opponent's application, to give security for costs—

(1) In TORT, if the defendant proves by affidavit that he has a good defence, and that the plaintiff has no visible means of paying the costs if he loses; in such case, the Court will remit the case to the County Court, unless the plaintiff shows that he has means to pay the costs, or gives security for costs (County Courts Act, 1919, Sec. 2).

(2) In all cases, security may be ordered—

(*a*) If the plaintiff resides permanently abroad; i.e. not in England, Wales, Scotland, or Ireland (*Republic of Costa Rica* v. *Erlanger*, 1876, 1 C.D. 171), and has no substantial property here which can be made available for the payment of costs (O. 65, r. 6a).

(*b*) If the plaintiff is a joint stock company and will be unable to pay costs.

(*c*) If the plaintiff is insolvent and merely a nominal one, e.g. the next friend of an infant (*Lloyd* v. *Hathern Station Brick Co., Ltd.*, 1901, 85 L.T. 158).

(*d*) As a rule, an insolvent appellant or applicant for a new trial will be ordered to give security, and security will also be ordered in such proceedings if they appear to be an abuse of the process of the Court. Application for security in this class of case should be made to the Court of Appeal (O. 58, r. 15).

An arbitrator under a submission by agreement out of Court cannot order security for costs (*Unione Stearinerie Lanza* v. *Wiener* [1917], 2 K.B. 558).

In all cases, security is given either by a bond, or by payment into Court.

(X) **APPLICATION TO HOLD DEFENDANT TO BAIL.**—This application must be made to a Judge, as it relates to the liberty of the subject. It is provided for by Section 6 of the Debtor's Act, 1869, as follows—

The plaintiff must prove by affidavit—

(*a*) That he has a good cause of action against the defendant for £50 or more.

(*b*) That there is good cause to believe that the defendant is about to leave England.

(*c*) That the defendant's absence will prejudice the plaintiff, as the defendant's evidence is necessary.

On proof of the above, the defendant, unless he gives security that he will not leave England without leave of the Court, may be arrested and imprisoned for not more than six months.

In the King's Bench he is arrested by a warrant from a Judge in Chambers; in Chancery a writ *ne exeat regno* is issued.

(XI) **APPLICATION FOR LEAVE TO DISCONTINUE.**—If a plaintiff desires to desist from proceeding with the action, or any part of it, he may discontinue. Leave of a Master is necessary if he has taken any step in the action after Defence other than making an interlocutory application; so if he has delivered a Reply or given notice of trial, leave to discontinue will be necessary.

Discontinuance without leave is effected by delivering written notice thereof to the defendant.

Discontinuance will not prevent the plaintiff commencing fresh proceedings later on, unless he discontinued with leave, which was given on the terms that he should not sue again (*Fox* v. *Star Newspaper*, 1900, A.C. 19).

Of course, in case of discontinuance, the defendant is entitled to the costs of the proceedings up to date (O. 26).

(XII) **APPLICATIONS FOR INJUNCTIONS OR THE APPOINTMENT OF A RECEIVER.**—Such applications, except for such relief by way of equitable execution, must be made to a Judge (O. 54, r. 12).

COSTS OF INTERLOCUTORY APPLICATIONS.—The rules as to the costs of interlocutory applications appear to be as follows—

(1) The successful party is entitled to his costs as costs in the cause, but the opposing party is not.

(2) The party making an unsuccessful application is not

entitled to his costs as costs in the cause, but the opposing party is.

(3) When an application is made by one party and not opposed by the other, the costs of both parties are costs in the cause.

These rules were laid down by Vice-Chancellor Leach in a Memorandum dated the 13th April, 1823. (*See* 24 R.R. 190.)

CHAPTER V

STEPS PREPARATORY TO TRIAL—ENTRY FOR TRIAL AND NOTICE OF TRIAL—TRIAL—JUDGMENT—APPEALS AND NEW TRIALS

As soon as the pleadings are closed, i.e. when the last one has been delivered, the parties serve on each other notices to produce documents at the trial, notices to inspect and to admit documents, notices to admit facts, and notice of trial, and the case is then entered for trial.

Of each of these in turn—

NOTICE TO PRODUCE DOCUMENTS AT THE TRIAL

Either party may serve on the other a written notice requiring him to produce at the trial all documents referred to in his pleadings or affidavit of documents, the notice specifying the documents.

The object of this notice is that if such documents are not produced, secondary evidence of their contents may be given where allowed by law.

This notice must be carefully distinguished from a notice to produce before trial (*see* p. 69), the object of which is to enable the party to see the document and obtain copies if so desired.

NOTICE TO INSPECT AND ADMIT (O. 32, r. 2)

This notice requires the party receiving it to inspect his opponent's documents and to admit that they are genuine if originals, or accurate if copies, and so obviate the necessity of proving them at the trial.

Refusal to admit them renders the party refusing liable to pay the costs involved in proving them, unless the Court thinks the refusal reasonable.

The admission, if made, is always made with the clause "saving all just exceptions," which means that the party merely admits that the signatures on the documents are genuine, but saves to himself the right to object at the trial that there are not enough signatures, or that the document is a privileged one, or that it is not properly stamped.

The cost of proving documents will not be allowed unless notice to inspect and admit has been given, or the omission to give it has, in the opinion of the Taxing Master, been a saving of expense.

NOTICE TO ADMIT FACTS (O. 32, r. 4)

This requires an opponent to admit certain facts, and refusal renders him liable to pay the costs incurred in proving them unless the refusal was reasonable.

This notice must be given not later than nine days before the date of trial mentioned in the notice of trial.

NOTICE OF TRIAL (O. 36, r. 15)

Notice of trial must be given before entry for trial, and may be given with the reply, or, if there is no reply, on expiration of four days after the last of the defences has been delivered or the issues of fact are otherwise ready for trial (O. 36, r. 11).

It must, as a rule, be given within six weeks after the close of the pleadings or other date when it might first have been given.

The length of notice is ten days as a rule; but by consent of the parties, or by order of a Master, a short notice, i.e. a four days' one, will suffice.

If the plaintiff does not give the notice within the time limited, the defendant may apply to have the action dismissed for want of prosecution, or may, as where he has a counterclaim, give notice of trial himself.

ENTRY FOR TRIAL

Where the action is to be tried in LONDON, MIDDLESEX, MANCHESTER, LIVERPOOL, or any of certain places, as specified from time to time by the Lord Chancellor, if the plaintiff does not enter it for trial on the same day or the day following that on which he gave notice of trial, the defendant may do so within the following four days, but if neither party does so within six days after notice of trial, the notice will lapse (O. 36, r. 16).

In other places, entry may be made up to seven days before Commission day (O. 36, r. 22b).

A case is entered for trial by leaving with the proper official two copies of the writ and pleadings, and also a memorandum requesting that the case be entered for trial.

METHODS OF TRIAL

There are five methods of trial—

(1) Before a Judge alone.

(2) Before a Judge and jury.

(3) Before a Judge and assessors.

(4) Before an Official or Special Referee.

(5) Before an Official or Special Referee and assessors.

In case of necessity, a Commissioner may be appointed to take the place of a Judge (Judicature Act, 1873, & O. 36, r. 44).

The method of trial is generally fixed at the hearing of the Summons for Directions, and that is the proper stage at which to apply for trial by jury, which must be ordered, in the following cases, i.e. libel, slander, breach of promise of marriage, seduction, false imprisonment, malicious prosecution, fraud, matrimonial causes, and probate actions to which the heir is a party (Juries Act, 1918).

It is provided by the Administration of Justice Act, 1920, Section 2, that after the expiration of the Juries Act, 1918, i.e. after six months from the expiration of the war, or on any earlier date specified by Order in Council, either party may apply for a trial without a jury, which shall be ordered if such method is the more convenient, notwithstanding anything in any Act, except in cases where, under the Juries Act, 1918, a jury must be ordered on application, in which cases no trial without a jury may be ordered unless both parties consent.

If neither party applies for a trial without a jury, it is not clear how a jury is obtained, unless the rules in existence before the Juries Act, 1918, revive; but, in any case, the plaintiff may, on signifying his desire for a trial without a jury in accordance with rules made under the Act of 1920, obtain such trial, unless the Court or Judge, on the application of the defendant, orders trial by jury.

Before the Juries Act, 1918, a jury could be obtained in libel, slander, breach of promise of marriage, seduction, false imprisonment, and malicious prosecution, by either party giving notice of a desire for trial with a jury (the plaintiff with his notice of trial, the defendant within four days after service of notice of trial); in other cases, application had to be made on the Summons for Directions.

In all cases, a Master may order different methods of trial for different issues, and that any one particular issue may be tried before any other one (O. 36, r. 8).

The jury may be a Common one or a Special one, the latter consisting of persons who are of a certain station in society, such as esquires, bankers, merchants, and the like.

A party entitled to a jury may have a special one on application made at the time at which the mode of trial is fixed, or, if the court or judge thinks fit, at any later stage (O. 36, r. 9).

THE ATTENDANCE OF WITNESSES

The usual method for securing the attendance of witnesses is to serve a *subpoena ad testificandum* calling on the witness to attend the trial, the expenses of which attendance must be tendered to him.

Failure to attend renders the party liable to attachment and damages.

If it is desired that the witness shall produce a document, a *subpoena duces tecum* must be served on him.

If a witness is in Scotland or Ireland, leave of Court must be obtained to serve him with the *subpoena.*

If the witness is in British Dominions abroad, a *mandamus* may go to the Court of the part where he is, ordering it to take the evidence, or a Commission may issue to someone there to take the evidence, each side being entitled to be present to examine and cross-examine.

If the witness is abroad but not in British Dominions, a request may be sent to the Court where he is to take the evidence, or a Commission may go.

If the witness is in gaol on a civil charge he may be brought up on a *habeas corpus ad testificandum,* which can be obtained only from a Judge; if he is in gaol on a criminal charge, an order to bring him up to give evidence must be obtained from a Secretary of State or a Judge.

If a witness is too ill to travel or too old (*primâ facie* over 70), an examiner may be sent to take his evidence.

If a witness will probably be out of the jurisdiction when the case comes on for trial, his evidence may be taken by an examiner and read at the trial if he is then still out of the jurisdiction.

In all cases where evidence is taken out of Court for use in Court, each side has a right to be present by themselves or their representatives, to examine and cross-examine respectively.

PROCEDURE AT TRIAL

If the defendant does not appear at the trial by himself or counsel, the plaintiff proves the matters in respect of which the burden of proof lies on him and applies for judgment with costs.

If the plaintiff does not so appear, the defendant applies to have the action dismissed with costs, and if he has a Counterclaim, proves it so far as the burden of proof lies on him and applies for judgment on it with costs.

If both parties appear, the party on whom the burden of proof lies, or in all cases of unliquidated damages the plaintiff, begins.

Assuming the plaintiff begins, the junior counsel, if two or more counsel are engaged and the trial is with a jury, opens the pleadings by stating briefly to the Court and jury the nature of the Claim and Defence and Counterclaim, if any; the leader then states the facts of the case to the Court at length; the witnesses are called, examined, cross-examined, and re-examined; the plaintiff's counsel will then sum up unless the defendant has tendered, or intends to tender, evidence, in which case defendant's counsel opens the Defence; the witnesses are called and examined as above stated, defendant's counsel then addresses the Court and plaintiff's counsel replies. Where no evidence is tendered by the defendant, then after the plaintiff's counsel has summed up the defendant's counsel addresses the Court.

Tendering evidence does not necessarily mean calling witnesses, for if in cross-examining on a writing used by the plaintiff's witness to refresh his memory the defendant's counsel refers to entries not referred to in chief, he has tendered these entries in evidence (*Gregory* v. *Tavernor*, 1833, 6 C. & P. 281; and see *Hibbert on Evidence*, 3rd Edition, p. 85).

In all cases where unliquidated damages are claimed, the plaintiff has the right to begin.

After the last of the speeches by counsel, the Judge, if no jury, gives judgment unless he desires to reserve it;

if there is a jury, the Judge sums up and directs them as to the points on which their verdict is desired, and after verdict gives judgment in accordance with the findings. He may direct the jury to find generally for the plaintiff or defendant, or to find a **special verdict,** i.e. to say whether certain facts exist or not, and the Judge will then give such judgment as is in his opinion right in law on the findings of the jury.

A certificate of judgment issued by the Associate or Master is sufficient evidence on which the proper officer may enter judgment.

If the jury separate before giving their verdict, any verdict they give is still valid in a civil case (*Fanshaw* v. *Knowles* [1916], 2 K.B. 538); though not in a criminal case (*R.* v. *Ketteridge* [1915], 1 K.B. 467), unless the jury separate with leave of the Court (Juries Detention Act, 1897). If a stranger is in the room while the jury are deliberating, the verdict is invalid (*Goby* v. *Wetherill* [1915], 2 K.B. 674).

When, on findings of fact, the Judge has entered judgment against a party, such party may apply to the Court of Appeal to set aside the same and enter some other judgment on the ground that the original judgment was erroneous on the findings of fact.

In actions brought against an executor or administrator who has administered all the assets which have come to hand, a judgment *quando acciderint* may be obtained whereby any assets which come to hand later on may be taken to satisfy the judgment.

If the parties come to a settlement during the hearing of the case, the terms of the settlement are indorsed on counsels' briefs and a **juror withdrawn,** i.e. one of the jurymen leave the box and the proceedings are thereby terminated.

COSTS

The rules as to the costs in the High Court are as follows—

(1) If the case is tried by a Judge alone, the costs must be asked for.

(2) If the case is tried with a jury, the costs follow the event, i.e. the party who wins is entitled to them, unless there is an order to the contrary.

(3) If the action could have been brought in the County Court, then by the County Courts Act, 1919, Section 11—

(*a*) If the plaintiff recovers less than £10 in tort, or less than £40 in contract, he gets no costs, unless there is a special order.

(*b*) If the plaintiff recovers £10 but less than £50 in tort, or £40 but less than £100 in contract, he gets costs on the County Court scale, unless there is a special order to the contrary.

(*c*) If in an action on contract the plaintiff within twenty-one days after service of the writ, or within such further time allowed by the Court, obtains leave to sign judgment under O. 14 for £20 or more, either unconditionally or unless the amount is paid into Court, he is entitled to High Court costs unless otherwise ordered.

N.B.—In any case where the plaintiff recovers damages and something else, e.g. an injunction or specific performance, the above rules do not apply, and he is entitled to High Court costs, unless there is an order to the contrary (*Keates* v. *Woodward*, 1902, 1 K.B. 532).

If two parties obtain judgment against each other in the same or different Courts, whether the High Court or County Court, either party may apply to any of the said Courts to have the amounts set-off against each other, and judgment given for the party entitled to the balance (County Courts Act, 1919, Sec. 19).

NEW TRIALS AND APPEALS TO THE COURT OF APPEAL

Where a party is dissatisfied with the result of an action, he may, for good cause, obtain relief either by applying for a New Trial, or by Appealing. An application for a New Trial is an application for an order that the case be tried again by the Court below; an Appeal is a rehearing

by the Court of Appeal, which gives such judgment as it thinks ought to be given.

The Rules of the Supreme Court do not seem to indicate precisely the cases in which each application should be made, but the Court may always, in case of appeal, order a new trial; and in cases of application for a new trial, instead of ordering it, give such judgment as the case requires.

Roughly speaking, there are certain cases in which an application for a New Trial may be made, and in all other cases the remedy is an Appeal.

An application for a New Trial is to be made to the Court of Appeal by motion, of which fourteen days' previous notice must be served on the other side within six weeks after judgment (O. 39, r. 4), and if the action was tried with a jury, the notice must state the grounds on which it, the application, is made; but if the action was tried without a jury, the grounds need not be stated, nor need a new trial be specifically asked for (O. 39, r. 3), and the Court may treat such application as an appeal.

A New Trial may be granted on any of the following grounds, and subject to an exception in cases of trials without a jury, the particular ground must be stated in the notice of motion.

The grounds are—

(1) Misdirection of the jury, or wrongful reception or rejection of evidence, provided in each case a miscarriage of justice has been thereby caused (O. 39, r. 6).

(2) That the verdict of the jury was not taken on some particular ground; but if there has been no request to leave such point to the jury, no new trial will be ordered, unless there has been a miscarriage of justice caused thereby.

(3) That the verdict was against the weight of the evidence, i.e. one wnich the jury viewing the whole of the evidence, could not reasonably have found (*Met. Ry. Co* v. *Wright*, 1886, 11 A.C. 152).

(4) That the damages were inadequate or excessive; in this case the Court of Appeal may, with the consent of both parties, though not otherwise, assess the damages (*Watt* v. *Watt*, 1905, A.C. 115).

(5) That there has been some mistake or inadvertence. So in *Stokes* v. *Latham*, 1888, 4 T.L.R. 305, an unauthorized compromise was set aside and a new trial granted; and in *Isaacs* v. *Evans*, 1900, 16 T.L.R. 480, where a judge non-suited a plaintiff on his counsel's opening and without hearing the evidence, a New Trial was granted.

(6) On the ground of surprise, as where a new case has been set up at the trial which has not lasted long enough to enable counsel to appreciate the effect of the change and procure evidence to meet it (*Hyppolyte Sohn* v. *Kilsby*, *Times Newspaper*, 21 Mar., 1914); but in *Isaacs* v. *Hobhouse* (120 L.T.R. 331), where the Statement of Claim put an interview as in February, 1915, as to which there was no issue; but at the trial the defendant put in evidence that it was in 1914, and the plaintiff had no evidence to prove it was in 1915, a New Trial was refused as the trial continued for eight days thereafter.

On an application for a new trial, the Court of Appeal has the same powers as when hearing an appeal (O. 39, r. 2), i.e. subject to certain conditions may receive fresh evidence, and may draw any inferences of fact and give any judgment that is proper on the material before the Court.

If only one inference can be drawn from the evidence, the Court of Appeal must draw it and give judgment instead of ordering a new trial (*Winterbotham & Co.* v. *Sibthorp & Co.* [1918], 1 K.B. 625).

If a New Trial is ordered the case will be tried again by the Court below with a fresh jury.

APPEALS

In case of other grounds for dissatisfaction with the judgment, e.g. on a point of law as to what judgment

should be entered on the findings of fact, the disappointed party may appeal to the Court of Appeal by motion, fourteen days' notice of which must be served on the other side in case of appeal from a final judgment, and four days' notice in case of appeal from an interlocutory one. The appeal must be brought within six weeks from the date of the judgment if it is a final one, and within fourteen days if it is an interlocutory one, or an order in a matter which is not an action (O. 58, r. 15).

The time may be enlarged by the Court of first instance or by the Court of Appeal. The fact that a decision which has not been appealed against has been overruled by an appeal in a later case is not a ground for enlarging the time (*Re Wigfull & Sons, Ltd., Trademark* [1919], 1 Ch. 52).

On an appeal, the Court hears the case again on the evidence given in the Court below, as proved by Judge's notes or any other means the Court may direct. Fresh evidence may also be given without leave on interlocutory applications or in any case, as to matters which have occurred after the date of the decision from which the appeal is brought; in other cases, fresh evidence can only be given by leave and in special cases, i.e. if the Court thinks that the case has been decided on insufficient evidence, and that the evidence proposed to be adduced would be sufficient to enable the Court to discover the truth (*The Copiapo Manufg. Co.*, 1893, 10 T.L.R. 180).

The Court may draw inferences of fact and give any judgment that is proper (O. 58, r. 4), or it may order a new trial (O. 58, r. 5).

Leave to Appeal is necessary in the following cases—

(1) In case of orders made by consent, or as to costs only (Jud. Act, 1873, Sec. 49).

(2) From a Divisional Court on appeal from a lower Court (Jud. Act, 1873, Sec. 45).

(3) From an interlocutory order or judgment given by a judge (Jud. Act, 1894, Sec. 1 (1) (b)).

No Appeal will lie to the Court of Appeal in the following cases—

(1) From a judgment of the High Court in a criminal matter (Jud. Act, 1873, Sec. 47).

(2) When there has been a submission to a judge personally (*Ex parte Wilson*, 1872, L.R., 7 Ch. 45).

(3) When the judge has exercised a merely discretionary power; but if he has declined to exercise it or has manifestly proceeded on a wrong ground, an appeal will lie (*Crowther* v. *Elgood*, 1887, 34 C.D. 697).

(4) From an order of a judge giving unconditional leave to defend (Jud. Act, 1894, Sec. 1 (3)).

APPEALS TO THE HOUSE OF LORDS

Appeals lie to the House of Lords from Courts of Appeal in England, Scotland, and Ireland subject to the following conditions—

A certificate of two counsel that it is a proper case for appeal must be obtained, the appeal must be brought by petition to be presented within one year from either the last judgment appealed from, or from the termination of disability arising from infancy, coverture, unsoundness of mind, or absence out of Great Britain and Ireland; but the utmost limit in case of such absence is five years.

Two clear days' notice of intention to present the petition and a true copy of it must be served on the respondents.

No Appeal lies to the House of Lords in the following cases—

(1) In matrimonial causes and cases of declaration of legitimacy, except where the decision is either upon the grant or the refusal of a decree, or is upon a question of law (Jud. Act, 1881, Sec. 9).

(2) From an order absolute for dissolution or nullity of marriage where the party has not appealed against the decree *nisi* notwithstanding that he or she has had time and opportunity (Jud. Act, 1881, Sec. 10).

(3) From an order made by the Court of Appeal on an appeal in Bankruptcy from a Divisional Court which heard the matter on appeal from a County Court (Bankruptcy Act, 1914, Sec. 108 (2)).

(4) Registration and election appeals (Jud. Act, 1881, Sec. 14).

Leave of the Court of Appeal is necessary in the following cases—

(1) Appeals on questions of law in matrimonial causes (Jud. Act, 1881, Sec. 9).

(2) Bankruptcy appeals where such lie (Bankruptcy Act, 1914, Sec. 108 (2)).

CHAPTER VI

THE ARBITRATION ACT, 1889

ACTIONS may be decided by arbitration either by consent of the parties, or by order of Court. (*See* p. 13.)

Where parties have agreed IN WRITING to refer disputes to arbitration, such agreement is irrevocable unless the leave of the Court is obtained; so if in such case either party commences proceedings, the other may, after appearance, apply to a Master to have the action stayed and the matter sent to arbitration.

The Court may also order arbitration in any case where the prolonged examination of documents or any scientific or local investigation is involved, or if the dispute relates to matters of account.

A single arbitrator is to decide the dispute unless the parties agree that there shall be two, in which case the two may appoint an umpire who shall decide the case if the two cannot agree.

The award must be made by the arbitrators within three months after the inquiry is entered on, unless the parties agree for a more lengthy period. The umpire must make his award within one month after the time within which the arbitrators should have made theirs.

An award may be enforced by applying to a Master for leave to issue execution on it; the only defence to such application is some defect appearing on the face of the award. Any other objection, e.g. bias or fraud of the arbitrator, must be made the ground of an application to set aside the award (*Macarthur* v. *Campbell*, 2 A. & E. 52).

APPEALS IN ARBITRATION

The arbitrator may state his award in the form of a special case for the Court to deliver judgment on, in which case he is *functus officio* (Sec. 7 (b)); or he may at any

stage, and shall, if so directed by the Judge, state in the form of a special case for the opinion of the Court, any question of law arising in the course of the case (Sec. 19) ; in this case the arbitration will be continued after the Court has dealt with the point, the arbitrator being guided by the Court's decision in making his award.

Where an arbitrator has misconducted himself, or an arbitration or award has been improperly procured, or the award is bad in law on the face of it, a Divisional Court in the King's Bench, or a Judge in Chancery, may set the award aside (Sec. 11 (2) & R.S.C., O. 40, r. 6).

CHAPTER VII

EXECUTION

By execution is meant the method of enforcing a judgment against a party's property or person where he makes default in complying therewith.

The writs most commonly in use are the following—

(I) **FIERI FACIAS,** which directs the sheriff to seize the party's money and securities for money, and goods, and pay the money and any bank notes to the execution creditor, and recover what is due on the other securities for money, and sell the goods.

If the sheriff sells goods which are in the possession of the debtor, though not his, and the sheriff had no notice of claim by the true owner and is not negligent, the purchaser, if not negligent, gets a good title and the sheriff is not liable (Bankruptcy Act, 1913, Sec. 15).

By the proviso to the section, the owner can recover from any person liable other than the sheriff.

The only possible construction to put on this apparently contradictory clause is that if the judgment creditor, or his solicitor, has directed these particular goods to be seized, such person would be liable (*Smith* v. *Keal*, 1882, 9 Q.B.D. 340); as a rule, however, the solicitor directs the sheriff to seize the goods of the debtor, so the proviso seems of little value.

(II) **ELEGIT.**—This writ directs the sheriff to put the judgment creditor in possession of the debtor's lands, and the creditor holds them until out of the rents and profits the debt is paid, or he may apply under the Judgments Act, 1864, for an order of Court directing the debtor's interest in the land to be sold.

The writ is applicable to land held on a simple trust, but not on an active one (29 Car. 2, c, 3, Sec. 10, and 1 & 2 Vic. c. 10).

(III) **GARNISHEE ORDER.**—This is a method of taking in execution a debt due to the judgment debtor. The procedure is to obtain *ex parte* from a Master an order *nisi*, calling on the garnishee, i.e. the judgment debtor's debtor, to show cause why he should not pay the debt to the judgment creditor; if he does not show any such cause, the order is made absolute, and by leave may be enforced by execution against the garnishee.

The order *nisi* binds the whole debt, so that if the debtor's banking account is garnisheed, the bank must dishonour all cheques thereafter until the order is satisfied. Only liquidated debts, due in the present or at a future certain time, can be garnisheed, not those payable on a condition.

The judgment creditor has no better claim against the garnishee than the judgment debtor had.

(IV) **CHARGING ORDER.**—This is a method of taking in execution stocks and shares, money in Court, and a partner's share in the firm. The order is obtained from a Master, and may be obtained on an *ex parte* application in the first instance, when an order *nisi* will be made, calling on the party affected by it to show cause why it should not be made absolute; in default of such cause being shown, it is made absolute, but no steps can be taken to have the benefit of such charge until six months after the order. Of course, if notice of the application is given to the party affected, he can be heard on the first application and the order be made absolute in the first instance; but it is often advisable, in order to prevent the stock, etc., being disposed of by the judgment debtor, to apply *ex parte* at first, as the order *nisi* prevents the stock, etc., being dealt with. During the six months which must elapse before steps can be taken to get the benefit of the order, a stop order may be obtained to prevent the income being paid away.

(V) **EQUITABLE EXECUTION.**—This method is effected by applying to a Master for the appointment of a receiver,

but such appointment will only be made if there is some obstacle to legal execution, e.g. the debtor is not in possession of the land sought to be taken, but has only an equitable interest in it under an active trust, or has an equity of redemption in it, or it is sought to take the separate estate of a married woman. The receiver is entitled to receive the rents and profits, and in case of land, an order may be obtained under the Judgments Act, 1864, to have the debtor's interest sold.

A receiver will not be appointed if it appears that there will be nothing for him to receive, as in the case of a reversion on a life estate.

Reversions and remainders, in respect of which there are no profits, cannot be taken in execution, as there is no appropriate method; the only thing to do is to make the debtor bankrupt, if possible, and then his interest can be sold by the trustee in bankruptcy for the benefit of the creditors generally.

(VI) **ATTACHMENT.**—This means obtaining an order from a Judge to imprison the party, on the ground that he has been guilty of contempt of Court. It must be shown that he has been ordered by the Court to do, or not to do, something, and has made wilful default.

If the order has required him to DO something, it must have indorsed on it the time within which the act must be done, and also a statement that in default the defendant is liable to process of execution; otherwise no order of attachment for disobeying the order can be obtained.

(VII) **SEQUESTRATION.**—This is a method of enforcing judgments and orders against corporations who are required to do acts in a limited time, and refuse to obey. Under an order of the Court, the corporate property is seised and held until the contempt is purged.

In case of orders for payment of money, the property may be sold.

Execution cannot be levied in England and Wales on

judgments obtained in Courts outside England and Wales, except subject to the following conditions—

I. By the Judgments Extension Act, 1868, a judgment of the High Court of Justice in Ireland, or of the Court of Session in Scotland, for debt, damages, or costs may, subject to the exception hereafter mentioned, be enforced by execution in England or Wales on a certificate thereof being duly registered in the High Court of England.

The exception is a decree pronounced in absence in an action or proceeding on an arrestment used to found jurisdiction in Scotland. This refers to a judgment obtained in Scotland against a defendant who, though not there, has property there. Such judgment can only be enforced by an action here on it, when the English Court could inquire into the jurisdiction.

II. By the Inferior Courts Judgments Extension Act, 1882, similar provisions are made for the registration and execution of the judgments of the Inferior Courts of Scotland and Ireland.

The above Acts make provision for the enforcement in a similar way in Scotland and Ireland of judgments obtained in England (including Wales).

III. By the Administration of Justice Act, 1920, Part II, judgments for payment of money obtained in a superior Court in any part of British Dominions outside the United Kingdom, or in a Protectorate, or a territory in respect of which His Majesty has a mandate, may be registered in the High Court of England or Ireland, or in the Court of Session in Scotland, as soon as Part II of the Act has been applied to such part of British Dominions outside the United Kingdom by Order in Council, which Order can only be made on terms of reciprocity.

The United Kingdom includes England, Wales, Scotland, and Ireland, but not the Channel Islands nor the Isle of Man.

No such judgment can be registered if—

(1) The Court acted without jurisdiction;

(2) The debtor neither resided nor carried on business within the jurisdiction, unless he submitted to the jurisdiction ;

(3) The defendant was not duly served with process and did not appear, even though he resided or carried on business there or agreed to submit to the jurisdiction ;

(4) The judgment was obtained by fraud ;

(5) There is an appeal pending or the debtor satisfies the Court that he intends to appeal ;

(6) The judgment was in respect of a cause of action which, for reasons of public policy or for some other similar reason, could not have been entertained by the registering Court.

The only remedy on any other foreign judgment is to bring an action on it here and obtain an English judgment on which execution may levy. (*See* Hibbert : *International Private Law.*)

LEAVE TO ISSUE EXECUTION

Leave of a Master is necessary in the following cases—

(1) If six years have elapsed since judgment obtained (O. 42, r. 23).

(2) If there has been a change of parties (O. 42, r. 23).

(3) If a husband is entitled to execution on a judgment obtained by his wife, or liable to execution on a judgment obtained against his wife (O. 42, r. 23).

(4) Where a party is entitled to execution on a judgment of assets *in futuro.*

(5) Where a party is entitled to execution against shareholders of a company upon a judgment obtained against the company (O. 42, r. 23).

(6) To take in execution the separate estate of a member of a firm where he has not been personally served with the writ, but judgment has been signed against him in default of appearance.

PART III

CHANCERY PROCEDURE

As regards proceedings begun by WRIT, the steps are the same as in the King's Bench, except that in matters which are of a purely equitable nature, judgment cannot be signed in default of appearance or Defence, but the action must be set down for trial, the Statement of Claim being also filed in case of default of appearance. If appearance is entered, the steps are the same as in the King's Bench as regards the summons for directions, delivery of pleadings, etc., but at the trial no final judgment is, as a rule, given at the first hearing, as many inquiries have to be made under the directions of a Master before the facts on which the judgment can be founded are ascertained; the Judge therefore, at the first hearing, adjourns the further consideration of the case for such inquiries to be made, and the result of them is embodied in the Master's certificate on which the matter can again be brought before the Judge for final judgment.

If, however, no such inquiries are necessary, of course the case is heard, the evidence being given *vivâ voce*, as in the King's Bench, unless the parties have agreed that it shall be given by affidavit; but even in case of affidavit evidence, either party may give the other notice, within fourteen days after the expiration of the time limited for filing affidavits in reply, to produce any deponent at the trial for cross-examination, and if he is not produced his affidavit cannot be used without special leave (O. 38, r. 28).

The plaintiff's affidavits must be filed within fourteen days after consent given for such evidence, and a list thereof delivered to the defendant's solicitor; the defendant must file his affidavits in answer within fourteen days of the delivery of such list, and deliver a list to plaintiff's solicitor; the affidavits in reply must be

filed and a list delivered within seven days thereafter (O. 38). Consent for evidence by affidavit on behalf of a person under a disability is given by his guardian, or next friend, with leave of a Master. If a certificate is obtained from counsel that a cause is fit to be heard as a short cause, i.e. not likely to occupy more than ten minutes, then minutes of judgment having been agreed before certificate obtained, it may be heard very speedily as a short cause, no evidence being allowed, but the case being determined on the admissions in the pleadings.

When a case has been adjourned for **further consideration,** the matter is brought before the Master, by the party entitled to prosecute the order or his solicitor lodging within ten days of the order being entered and passed in Chambers a copy of the judgment adjourning the future consideration, and a note stating the names of the solicitors for all parties and for which of the parties the solicitor is concerned; in default, the other side may lodge such papers and have the prosecution of the order (O. 55, r. 32). Such party's solicitor then takes out a SUMMONS TO PROCEED and serves it on the other side, who can then attend at the hearing and be heard (O. 55, r. 33). In actions relating to the administration of the estates of deceased persons, or to the administration of trusts, persons who are interested, though not parties, are served with the judgment and may then, within one month, apply to vary or to discharge the judgment, or may appear in Chambers and be heard when the inquiries are held (O. 16, r. 40).

The Master gives all necessary directions, e.g. in administration actions as to advertising for claims against the estate, and rendering accounts, and when the inquiries are completed his certificate is drawn up as follows: The solicitors of the parties leave all necessary papers with one of the junior clerks in Chambers, and the draft certificate is prepared and an appointment given to the parties to attend to settle it. Disputes during the settlement may be adjusted by the Master referring the

matter to the Judge. The certificate, when finally settled, is filed, but either side may, within eight days after such filing, or at a later period with leave, take out a summons to vary it (O. 55, rr. 66–69).

The next step is to bring the matter before the Judge again for final judgment, which is done as follows: The solicitor who is setting the matter down for final judgment hands the Registrar's clerk a written request that it be set down, and produces to him the order adjourning the further consideration and an office copy of the Master's certificate; he also leaves with the Judge's secretary a copy of the order adjourning and of the Master's certificate, and if minutes of judgment have been prepared, two copies of them (O. 36, r. 21).

The case is then set down, but is not put into the paper till ten days later; notice of its having been set down is given to the other side not less than six days before the day for which the case is marked for hearing. The Court, at the hearing, then gives judgment, but one of the terms of the judgment is that each party shall have liberty to apply, so that if it appears later that some matter has not been provided for, a fresh application can be made to the Court.

The judgment pronounced by the Court then has to be drawn up, which is done as follows: The solicitor having the carriage of the proceedings leaves his counsel's brief with the Registrar, who prepares a draft and appoints a day for settling the same. The parties appear and the draft is settled; if either party is dissatisfied, he may make a motion to the Court to vary the minutes. When the judgment is finally settled it is engrossed, and then the engrossment is examined by the solicitors, who may apply to the Registrar if there are inaccuracies in it. When any such inaccuracies have been finally disposed of, the judgment is entered in the judgment book and a sealed copy delivered to the solicitor having the carriage of the proceedings (O. 62).

INTERLOCUTORY PROCEEDINGS

These are instituted by petition, by motion, or by summons; what each of these is has already been described (*see* p. 63).

If a long and intricate statement of facts is required, application is by petition, e.g. for leave to sell or lease under the Settled Estate Act, 1877. Applications for injunctions are always made by motion, while summonses are used in cases where they would be used in the King's Bench, e.g. for directions, discovery, etc.

A few remarks are necessary as regards certain interlocutory applications in Chancery—

(*A*) **Payment into and out of Court.** This is regulated by the Supreme Court Funds Rules, 1905.

PAYMENT IN. This may be made (1) Without order, or (2) After order.

(1) PAYMENT IN WITHOUT ORDER. This may be made on a direction to the Bank of England issued by the Paymaster-General on request by, or on behalf of, the person desiring to make such payment.

The cases to which the above applies are cases of payment in under various Statutes, e.g. The Parliamentary Deposits Act, 1846; The Trustee Act, 1893, the last-named applying in cases of funds or securities representing a legacy to which an infant or person beyond the seas is absolutely entitled; in this case, the payment in may be made by a request accompanied by the Inland Revenue certificate.

In any case of emergency, money may always be paid into the Suspense Account and a direction obtained later on.

(2) PAYMENT IN AFTER ORDER. If in any cause or matter a party admits in any pleading or affidavit that he has money in hand on account of an estate involved in the litigation, he may apply by SUMMONS for leave to pay it into Court if it does not exceed £1,000.

If it exceeds £1,000, the application must be by Petition. The actual payment in is made by leaving at the Chancery Pay Office a copy of a Lodgment Schedule, which is always

annexed to the order, setting out the date of the order, the title of the cause, the title of the ledger credit to which the funds are to be placed, the name or identifying description of the person by whom the funds are to be lodged, and the amount of the funds.

The party then obtains a direction to the Bank of England to receive the money, and he takes the direction and the money to the bank and pays the money in.

PAYMENT OUT. This is always under an order, and the procedure is as follows—

The order is applied for by summons, unless it is necessary to look at some instrument under which the title to the fund arises, which fund is over £1,000, when the application should be by Petition. The order itself contains a Payment schedule, setting out the title of the cause, date of the order, ledger credit to which the funds are standing, and a statement of the funds, and the full name or business name of the payee. This schedule is left at the Pay Office, and after two or three days the payee attends with his solicitor, who has been previously identified and who identifies him, and receives a cheque for the amount.

(*B*) **Sale by Order of Court** (O. 51). It is often necessary in the course of proceedings to order property to be sold. The sale may be (1) In Court; (2) Out of Court.

(1) SALE IN COURT. In this case, the Court directs who shall have the conduct of the sale; and in administration suits or trust cases, the party who has the conduct is usually the personal representative or trustee respectively.

The Master refers the abstract of title to one of the conveyancing counsel of the Court, who reports on the title and prepares the conditions of sale. The Master then appoints a day for the sale, and directs advertisement of the same; he also fixes the reserve price and delivers the same in a sealed envelope to the auctioneer; the envelope is not to be opened till the day of sale. After the sale, the auctioneer and the solicitor of the party,

who has the conduct of the sale, certify the result to the Master, the deposit is paid into Court by the auctioneer, and the rest of the purchase money is also paid into Court by the purchaser.

(2) SALE OUT OF COURT. This may be ordered by the Judge if all parties interested in the property are before the Court or are bound by the judgment.

The sale may be either—

(*a*) By laying proposals before a Judge in Chambers for his sanction; or

(*b*) By proceedings altogether out of Court, the money being paid into Court or otherwise as the Court may direct.

(*C*) **Application for Maintenance of an Infant** (O. 50, r. 9). In administration or trust actions, it is often necessary to apply for the application of the income of the property to the maintenance of an infant. The application is made by summons, and such order may be made where the Court is satisfied that the property, the subject of the proceedings, is sufficient to answer all claims. In such case, instead of waiting until the Master's certificate is complete, the Court may direct the income to be applied to the infant's maintenance.

(*D*) **Application for Leave to Marry a Ward of Court.** This may be necessary in administration or trust proceedings, or may be an original application; in either case, the application is made by Petition setting out the age of the ward, the fortune of each party, and the rank and position of the party with whom the marriage is to take place.

(*E*) **Inquiry as to Title.** In actions for specific performance, and in applications by originating summons under the Vendors and Purchasers Act, 1874, the Court may order an inquiry into title. A summons to proceed is taken out, and at the hearing before the Master he will order the abstract of title and requisitions thereon in dispute to be left at Chambers, and will make an

appointment to proceed thereon so that the points in dispute may be discussed. When these points are settled, he certifies the result and the matter is brought before the Judge on further consideration in the usual way.

PROCEEDINGS COMMENCED BY PETITION, SUMMONS, AND MOTION

In all the above cases, the evidence is by affidavit, though the Court or Judge may, on the application of either party, order the deponent to be produced for cross-examination.

The following proceedings are commenced by Petition in Chancery—

(1) Application for leave to pay trust money into Court or to get money paid out of Court, if the amount exceeds £1,000; in these cases, an affidavit must be filed describing the trust and the names and addresses of the persons interested.

(2) Application for the compulsory acquisition of land under the Lands Clauses Consolidation Act, 1845.

(3) Application to make leases or to sell land under the Settled Estates Act, 1877.

(4) Applications to wind up a company.

In proceedings commenced by Petition, the Petition must set out the particulars, and at the foot must contain a note stating on whom it is proposed to serve it, or if it is not proposed to serve it on anyone, stating this fact. The Petition is filed, and a copy thereof, with a Fiat on it stating the date of the hearing, is served on the respondent (O. 52, r. 16).

PETITIONS OF COURSE—These are *ex parte* applications on which the order is made as a matter of course. They are used to get an order for the taxation of a solicitor's bill, and for the appointment of a new next friend. The Petition is left with the Registrar who draws up the order (O. 62, r. 18).

PETITIONS OF RIGHT.—This is a special kind of Petition used to institute proceedings against the Crown, and will only lie for the recovery of property, or price of goods sold, or damages for breach of contract (23 & 24 Vic. c. 34).

The procedure is to leave the Petition with the Home Secretary in order to obtain the Fiat, or permission of the Crown, to sue. When the Fiat is obtained, it is filed with the Petition in the Central Office of the High Court, and a copy of the Petition is served on the Treasury Solicitor; the litigation then proceeds in the usual way. If judgment is obtained for the recovery of property, it has the effect of putting the party in possession of it, so that he can claim it from anyone who has it. In other cases, if the Crown will not satisfy the judgment, there are no means of enforcing it.

PROCEEDINGS COMMENCED BY SUMMONS.—A summons commencing a proceeding is called an Originating summons.

Such summons, as a rule, requires an appearance to be entered to it, though the case itself is heard in Chambers, which is a saving of time and expense.

In default of appearance, an application should be made for a date to be appointed for the hearing, and such date will be appointed on proof by a certificate from the Writ Department that no appearance has been entered.

No appearance need be entered to the following summonses (O. 54, r. 4f)—

(1) Under the Solicitors Act, 1843.

(2) On an application to order a solicitor to deliver up papers, money, securities, or cash accounts.

(3) Under the Arbitration Act, 1889.

(4) In interpleader.

(5) In case of applications for relief under the Bills of Sale Act, 1882.

(6) In the case of applications under Section 17 of the Married Women's Property Act, 1882, to determine

whether certain property is separate estate. The County Court also has jurisdiction in such cases.

(7) For inspection of the Register of a Joint Stock Company.

(8) Under O. 61, r. 27, to enter memorandum of satisfaction of a Bill of Sale.

(9) In cases relating to Parliamentary or Municipal election petitions.

Originating summonses are used in the following cases also—

(1) For the administration of the estate of a deceased where the case is a simple one (O. 55, r. 2).

(2) To determine a question affecting the rights of creditors, legatees, devisees, heir, or next-of-kin, or the ascertainment of any class of such persons (O. 55, r. 3).

(3) For the determination of a question of construction arising under a deed, will, or other instrument (O. 54a).

(4) For the appointment of new trustees and the making of the consequent vesting order (Trustee Act, 1893).

(5) For foreclosure and redemption of mortgages.

(6) To obtain a guardian and maintenance for an infant. (In this case, evidence must be given by affidavit showing the age of the infant, the nature and amount of his fortune, what relatives the infant has, and the fitness of the proposed guardian.)

(7) Under the Infants Settlement Act, 1855, to get the leave of the Court to make a binding settlement of an infant's property on marriage. The infant must be at least 20 if a male, and 17 if a female.

The evidence must show the age of the infant, who are the parents or guardians or persons with whom the infant is living; the rank and position in life of the infant; the property of the infant; the age, rank, position in life and fortune of the proposed husband, or wife, as the case may be · the fitness of the trustees of the proposed settlement; the terms of settlement.

(8) Under the Settled Land Acts, 1882 to 1890. Under these Acts, applications are made for leave to lease or sell when necessary, and for payment of capital moneys into Court.

(9) Under the Vendors and Purchasers Act, 1874. Under this Act, disputes between vendors and purchasers of land may be adjusted, so long as the matter does not affect the existence or the validity of the contract.

MOTIONS.—This method is rarely used for commencing proceedings, but may be used to enforce an agreement for the remuneration of a solicitor under the Solicitors Remuneration Act, 1870, and to strike a solicitor off the rolls.

A notice of motion stating the grounds thereof, with a copy of any affidavit in support thereof, must be served not less than ten days before the time fixed for making the application. If no affidavits are being used, the period is two days only, unless the application is to strike a solicitor off the rolls, when it is ten days (O. 52, r. 5).

MOTIONS OF COURSE.—Some motions are made without notice to the other side, and are not, as a rule, heard in Court. Counsel is briefed, and he signs the brief and hands it to the Registrar, who enters it and returns it initialed to counsel. The order is then drawn up by the Registrar and served on the other side.

Motions of Course are an alternative to Petitions of Course. (*See* p. 103.)

APPENDIX

FORM OF A WRIT

(THE FACE OF IT)

IN THE HIGH COURT OF JUSTICE,
KING'S BENCH DIVISION. 19.., B 114

BETWEEN

John Brown, Plaintiff.

and

John Smith Defendant.

George the Fifth by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, to

John Smith,
of 1 *Linden Grove,*
Croydon,

in the County of Surrey.

We Command You That within Eight Days after the Service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of

John Brown.

And take notice that in default of your so doing, the Plaintiff may proceed therein, and Judgment may be given in your absence.

WITNESS,

Lord High Chancellor of Great Britain, the *9th* day of *April,* in the year of Our Lord one thousand nine hundred and

N.B.—This Writ is to be served within Twelve Calendar Months from the date thereof, or, if renewed, within Six Calendar Months from the date of the last renewal including the day of such date, and not afterwards.

The Defendant may appear hereto by entering an appearance either personally, or by Solicitor, at the Central Office, Royal Courts of Justice, Strand, London.

FORM OF A WRIT

(THE BACK OF IT)

The Plaintiff's claim is for damages for assault.

This Writ was issued by *A*, of —— solicitor for the Plaintiff, whose address for service is

Indorsement to be made within three days after service.

This Writ was served by me at
on the Defendant
on Monday, the 10*th* day of *May*, 19..
Indorsed the 11*th* day of *May*, 19..
Signed
Address

PRECEDENTS OF PLEADINGS

Indorsements on Writs

General Indorsements—

(1) The Plaintiff's claim is for damages for assault.

(2) The Plaintiff's claim is for damages for a libel appearing in *The Times* newspaper of 1st February, 19..

Special Indorsements—

I. ON A BILL OF EXCHANGE

(1) The Plaintiff claims £191 due on a Bill of Exchange, dated —— drawn by the Defendant A on and accepted by the Defendant B payable on demand to the Defendant C and indorsed by the Defendant C to the Plaintiff, which said bill was duly presented to the Defendant B for payment on —— and dishonoured of which dishonour written notice was duly given to the Defendants A and C on the same day.

Particulars

(*Date*)	To amount of bill = = =	£200
	Cost of protesting = = =	1
		£201
	By cheque, 1st Feb., 19.. =	10
	Balance due = = =	£191

And the Plaintiff claims interest until judgment or payment.

II. GOODS SOLD AND DELIVERED

The Plaintiff's claim is for £100 the price of goods sold and delivered by the Plaintiff to the Defendant to his order and accepted by him.

Particulars

(*Dates and Items*)

III. RECOVERY OF LAND AND RENT

The Plaintiff's claim is for £x arrears of rent and for possession of premises known as ——, which said premises were demised to the Defendant by the Plaintiff by an Indenture of lease dated —— for a period of five years at a rent of £50 a year payable quarterly. The said indenture contained a proviso for re-entry if the said rent should be in arrear by the space of one month.

The Defendant has paid no rent since ——

The Plaintiff claims possession and £x arrears of rent.

Defence

The Defendant is in possession of the premises referred to in the Statement of Claim.

Statements of Claim and Defence

I. IN CONTRACT

Statement of Claim

(1) On —— the Defendant verbally agreed to employ the Plaintiff, and the Plaintiff agreed to serve the Defendant as cashier in the Defendant's business of a draper carried on at —— at a salary of £10 per month.

(2) At all times material to this action the Plaintiff was ready and willing to serve the Defendant as such cashier.

(3) On —— the Defendant wrongfully dismissed the Plaintiff from his said employment.

(4) There was due to the Plaintiff on the —— the sum of £10 for wages accrued due up to that date.

(5) The Plaintiff claims—

1. £10 in respect of the wages referred to in par. 4 hereof.

2. Damages for wrongful dismissal.

Defence and Counterclaim to above

(1) The defendant denies that he wrongfully dismissed the Plaintiff as alleged in par. 3 of the Statement of Claim. The Defendant dismissed the Plaintiff in consequence of the Plaintiff having embezzled two sums of money received by him for and on account of the Defendant; namely

£10 received by the Plaintiff from one X on ——.

£10 received by the Plaintiff from Y on ——.

(2) The Defendant denies that any wages were due to the Plaintiff as alleged in par. 4 of the Statement of Claim.

Counterclaim

(3) The Defendant repeats par. 1 hereof and counterclaims for £20 in respect thereof.

II. RECOVERY OF LAND

Statement of Claim

BETWEEN *A* Plaintiff.

and

C & D Defendants.

The Plaintiff is the administrator of X deceased.

(1) On —— one X by indenture of lease demised to the Defendant C a farm known as —— for the term of twenty-one years at a yearly rent of £60 payable quarterly, and the said indenture contained a covenant by the said C to insure the said premises against fire in the sum of £800, and a proviso that on breach of the said covenant the lessor, his heirs, executors, administrators, and assigns might re-enter and determine the said lease.

(2) On —— the said X died intestate.

(3) On —— letters of administration to the estate of the said X were granted to the Plaintiff by His Majesty's High Court of Justice.

(4) The Defendant C has not insured the said premises.

(5) The Defendant D is in possession.

(6) The Plaintiff claims as against both Defendants possession.

Defence and Counterclaim

(1) Neither Defendant admits the death or intestacy of the said X as alleged in par. 2 of the Statement of Claim.

(2) Neither Defendant admits the letters of administration referred to in par. 3 of the Statement of Claim.

Counterclaim

(3) By a written agreement contained in letters passing between the said X and the Defendant C and dated ——, it was agreed for the sale of the farm referred to in par. 1 of the Statement of Claim to the Defendant C for the price of £1,000.

(4) By an indenture of underlease dated —— and made between the Defendant C and the Defendant D, the said farm referred to in par. 1 of the Statement of Claim was demised to the Defendant D for the residue of the term under which the Defendant C held it less three days.

(5) The Defendant C counterclaims for specific performance of the agreement referred to in par. 3 hereof.

(6) Both Defendants counterclaim for relief against forfeiture for breach of the covenant to insure alleged in par. 4 of the Statement of Claim.

Reply

(1) The Plaintiff joins issue on the Defence save in so far as the same consists of admissions.

(2) The Plaintiff does not admit the written agreement referred to in par. 3 of the Defence and Counterclaim nor the indenture of underlease referred to in par. 4 thereof.

(3) The Plaintiff says that the correspondence referred to in par. 3 of the Defence and Counterclaim does not constitute a sufficient memorandum within section 4 of the Statute of Frauds.

III. In Tort

Statement of Claim

BETWEEN *A* Plaintiff

and

The Great Western Railway Coy. Defendant.

(1) The Plaintiff is and was at all times material to this action a barrister, and the Defendant company are carriers of passengers for reward.

(2) On —— the Defendant company agreed for reward to carry the Plaintiff safely from X to Y.

(3) On the said —— the Defendant Company and/or their servants were guilty of negligence in respect of the said carriage of the Plaintiff.

Particulars of Negligence

The servants of the Defendant company invited the Plaintiff to alight at Y station without supplying sufficient light at the said station to enable him to do so safely, although it was 10 o'clock P.M. and a dark night.

(4) In consequence of the matters alleged in par. 3 hereof, the Plaintiff in alighting fell on to the permanent way and suffered the following injuries—

Particulars of Injury

(5) The Plaintiff claims £100 special damage.

Particulars of Special Damage

Doctor's bill £----------

Nurse, etc. £----------

(6) The Plaintiff also claims damage for pain and suffering.

Defence

(1) The Defendants do not admit that they agreed to carry the Plaintiff from X to Y safely or at all as alleged in par. 2 of the Statement of Claim.

(2) The Defendants do not admit that they or their servants were guilty of negligence as alleged in par. 3 of the Statement of Claim or at all.

(3) The Defendants do not admit that the Plaintiff suffered the injuries alleged in par. 4 of the Statement of Claim in consequence of any negligence of themselves or their servants or at all.

(4) If the Plaintiff suffered the injuries alleged in par. 4 of the Statement of Claim, it was in consequence of the Plaintiff's contributory negligence in alighting from the train before it had stopped at the said Y station.

IV. IN SLANDER

Statement of Claim

(1) The Plaintiff is, and was at all times material to this action, a builder.

(2) On —— the Plaintiff falsely and maliciously spoke and published to X and Y of and concerning the Plaintiff the following words: "Jones has practically obtained money by false pretences," meaning thereby that the Plaintiff has been guilty of a crime.

(3) In consequence of the matters referred to in par. 2 hereof, the Plaintiff has suffered loss in his trade as a builder.

Particulars of Special Damage

£100

(4) The Plaintiff claims £100 special damage and also damage for the said slander.

Defence

(1) The Defendant is, and was at all times material to this action, a solicitor.

(2) The Defendant did not speak or publish to X and Y or to either of them the words referred to in par. 2 of the Statement of Claim as alleged or at all.

(3) The words referred to in par. 2 of the Statement of Claim are true in substance and fact.

(4) If the Defendant spoke and published the words referred to in par. 2 of the Statement of Claim, which is denied, he did so without malice and on a privileged occasion, namely, when engaged in giving professional legal advice to his clients the said X and Y.

Interrogatories Delivered on behalf of the Plaintiff in the above action

(1) Did you on the day of speak and publish to X and Y or to either and which of them the words set out in par. 2 of the Statement of Claim, or other and what words to the same effect?

(2) About what matter were the said X and Y consulting you when you spoke and published to them the words set out in par. 2 of the Statement of Claim.

(3) What facts induced you to utter the words set out in par. 2 of the Statement of Claim.

(4) Had you not had frequent disputes with the Plaintiff during the year in reference to his charges for building work done for you by him.

(5) Had you not had frequent disputes with the Plaintiff during the year in reference to your charges for legal work done by you for him.

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